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October Term, 1994

FRANK J. KELLEY, Attorney General of the State of Michigan on behalf of the Citizens of the State of Michigan; HERBERT P. READ; NORMAN W. PERMAN; SUSAN KIMMELMAN; THE LAKE MICHIGAN FEDERATION; and DON'T WASTE MICHIGAN,

Petitioners,

v.

IVAN SELIN; JAMES R. CURTISS; E. GAIL DEPLANQUE; FORREST J. REMICK; KENNETH C. ROGERS; UNITED STATES NUCLEAR REGULATORY COMMISSION; and UNITED STATES OF AMERICA,

Respondents,

CONSUMERS POWER COMPANY,

Intervenor/Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. Whether, contrary to this Court's decisions in *Reno v. Catholic Social Services, Inc.*, 113 S.Ct. 2845 (1993) and *Lujan v. National Wildlife Fed'n*, 497 U.S. 871 (1990), and in conflict with the decisions of other federal circuits, the United States Court of Appeals for the Sixth Circuit improperly rejected as untimely a challenge to a Nuclear Regulatory Commission rule brought by landowners of property adjacent to a nuclear power plant, when it was not until an amendment to the rule was finalized that the rule was first concretely applied to the landowners' property rights and interests?

II. Whether, as the United States Court of Appeals for the Sixth Circuit determined, the Nuclear Waste Policy Act, 42 U.S.C. § 10198(a), permits the Nuclear Regulatory Commission to license the long-term st- -age of high level nuclear waste outside of each nuclear reactor site in this country without any site-specific public hearings under the Atomic Energy Act, 42 U.S.C § 2239, or site-specific environmental studies under the National Environmental Policy Act, 42 U.S.C. § 4321, when other federal circuits have recognized that such hearings and studies are warranted under analogous circumstances?

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PETITION FOR WRIT OF CERTIORARI

Petitioners, Frank J. Kelley, Attorney General of the State of Michigan on behalf of the Citizens of the State of Michigan; Herbert P. Read, Norman W. Perman, and Susan Kimmelman (all of whom are landowners of property adjacent to or near the Palisades Nuclear power plant in Covert, Michigan ("Palisades")); the Lake Michigan Federation, and Don't Waste Michigan (both environmental groups representing members who live and use property adjacent to Palisades), respectfully request this Court to issue a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Sixth Circuit denying, *inter alia*, a Petition for Review of a final rule adopted by the United States Nuclear Regulatory Commission on May 7, 1993.

OPINIONS BELOW

On August 17, 1990, the United States Nuclear Regulatory Commission (the "NRC") finalized a new set of regulations concerning the licensing and storage of high level nuclear waste in independent spent fuel storage installations, including a type of installation commonly known as a cask. Final notice of the regulations is published at 55 Fed. Reg. 29,181 (July 18, 1990). The regulations -- referred to generally as Subpart K -- can be found at 10 C.F.R. § 72.210, *et seq.*, and in the Appendix at 60a-66a.[1]

On May 7, 1993, three years after the adoption of Subpart K, the NRC finalized an amendment to those regulations by adding a new storage container to the list of approved casks in Subpart K. Final notice of that amendment can be found at 58 Fed. Reg. 17,948 (April 7, 1993). This amendment to Subpart K is published at 10 C.F.R. § 72.214. (App. 64a.)

On January 11, 1995, the United States Court of Appeals for the Sixth Circuit issued its opinion denying a challenge to these

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[1] Hereinafter, all references to the Appendix will be cited ("App. ___.").

regulations. The opinion is reported as *Kelley v. Selin*, 42 F.3d 1501 (6th Cir. 1995). (App. 1a-40a.)

JURISDICTION

The judgment as to which petitioners are seeking review was issued by the United States Court of Appeals on January 11, 1995. Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

There are several statutory and regulatory provisions involved in this petition. Pursuant to United States Supreme Court Rule 14.1(f), citations to those statutes and regulations are set out below. The full text for each statute and regulation is included in the Appendix as identified below.

28 U.S.C. §§ 2342(4), 2344 (Hobbs Act) (App. 55a.)
42 U.S.C. § 2239(a) (Atomic Energy Act) (App. 56a.)
42 U.S.C. § 10198(a) (Nuclear Waste Policy Act) (App. 57a-58a.)
42 U.S.C. § 4321 (National Environmental Policy Act) (App. 57a.)
10 C.F.R. § 72.210 to 72.220 (App. 59a-66a.)

STATEMENT OF THE CASE

Petitioners seek review of a judgment issued by the United States Court of Appeals for the Sixth Circuit. The administrative law questions presented by this petition involve issues of enormous significance to Petitioners and the public at large. The specific legal issues concern, among other things, the appropriate time within which Petitioners may challenge the application of a federal regulation affecting their property rights, their health and safety, and their environment. In a broader sense, however, the issues presented also address the question of how much input Congress intended the public to have concerning *de facto* permanent storage of high level nuclear waste through the next century, at the more

than seventy civilian nuclear reactors throughout the United States (including the six reactors along the shoreline of Lake Michigan). If left unreviewed, the Sixth Circuit's judgment will cause confusion among the lower federal courts (i) as to when challenges to federal regulations are timely, and (ii) as to whether Congress intended, by the passage of a limited amendment to the Nuclear Waste Policy Act ("NWPA"), 42 U.S.C. § 10198(a), to eliminate an array of hearing rights and environmental analyses mandated by Congress in the Atomic Energy Act (the "AEA"), 42 U.S.C. 2239(a) and the National Environmental Policy Act ("NEPA"), 42 U.S.C. 4321.

A. Background.

The Palisades nuclear power reactor, operated by Consumers Power Company ("Consumers"), generates electricity by using compressed rods of uranium fuel that are placed in the core of the reactor. *Kelley v. Selin*, 42 F.3d 1501, 1505 (6th Cir. 1995). The waste by-products from this operation are highly radioactive fuel rods that remain dangerous to human health and the environment for centuries. *Id.*

Consumers, like most nuclear reactor utilities throughout the United States, historically has stored its spent fuel rods inside its nuclear reactor facility in a pool of water known as a "wet pool." *Id.* The operating license in effect at Palisades since 1971 permits the storage of high-level waste in the wet pool; however, an amendment to the Palisades license would be necessary before Palisades could expand the size of its pool or rearrange the racks holding the spent fuel in the pool. *Id.*

By the late 1980s, the wet pool at Palisades, like those at many nuclear reactors throughout the United States, was nearing capacity. Although in 1988 Congress determined that a permanent repository for high-level nuclear waste should be developed in Nevada, 42 U.S.C. § 10133-10136, 10172, the development of that repository has been stalled, with the projected completion date pushed back as far as 2015, or even 2025 or later. *E.g.*, Keith Schneider,

Utilities Filling Void in Storing Nuclear Waste, N.Y. Times, Feb. 16, 1995. (App. 84a-88a.)

To address its waste storage problem, Consumers settled upon a plan to construct and maintain a group of concrete storage containers, known as dry casks, outside of the reactor complex at Palisades in a sand dunes area within one hundred fifty yards of the Lake Michigan shoreline. The type of cask Consumers chose for its outside storage installation was a new cask design known as the VSC-24.[2] Prior to its use by Consumers, the VSC-24 had never been used, nor had it been fully tested, by any nuclear reactor facility.

B. Consumers Applies for But then Withdraws Its Request for a License/The NRC Adopts Subpart K.

In 1990, Consumers applied for a license, pursuant to 10 C.F.R. § 72, to store spent fuel in VSC-24 casks at Palisades. As required by the AEA, 42 U.S.C. § 2239(a), and the NWPA, 42 U.S.C., § 10154, the NRC advised the public that "any person whose interest may be affected by the licensing proceeding" could file a request for a hearing. 55 Fed. Reg. 28,853 (July 13, 1990). In addition, the NRC stated that Consumers had filed, pursuant to NEPA, an environmental report concerning Consumers' plan to use the VSC-24 cask at Palisades. *Id.* In response to that notice, the NRC received numerous responses, including letters from Petitioners, about the right to a hearing on health, safety, and environmental issues regarding the license application filed by Consumers. *Kelley v. Selin*, 42 F.3d at 1505.

Five days after the NRC advised the public of its right to request a hearing on the Palisades license application, the NRC published a final rule which included an additional set of regulations

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[2] The VSC-24 -- meaning "ventilated storage cask" -- is a concrete storage cask with a steel, seal-welded basket that fits into the concrete container. When fully loaded, the VSC-24 holds 24 spent fuel assemblies and weighs approximately 130 tons. *Kelley v. Selin*, 42 F.3d at 1505.

relating to nuclear waste storage. 55 Fed. Reg. 29,181 (July 18, 1990). The new regulations, commonly referred to as Subpart K, purported to grant a "general license" to nuclear power reactors to store spent fuel at the reactor sites in any cask on the approved list in Subpart K. 10 C.F.R. § 72.210. Under Subpart K, the manufacturer of a cask on the approved list is issued a so-called Certificate of Compliance, which sets out the conditions under which the approved cask may be used. *Id.* at § 72.214. The cask that was the subject of Consumers' then-pending license application for Palisades -- the VSC-24 cask -- was *not* on the approved list in 1990, and *no* Certificate of Compliance had yet been issued for that cask.[3/]

On August 17, 1990, the same day that the new regulations in Subpart K became final, Consumers withdrew its application for a license to store waste in VSC-24 casks at Palisades. 55 Fed Reg. 35,384 (August 29, 1990). With the use of the VSC-24 casks at Palisades apparently abandoned, and in light of the fact that the VSC-24 cask was not on the list of approved casks under Subpart K, none of the Petitioners had reason, at that time, to challenge the 1990 regulations.

[3/] Under the framework established by Subpart K in 1990, a utility invoking Subpart K must take a series of steps before it is permitted to use a cask on the approved list. For example, the utility must perform a written evaluation to determine if the cask storage pads and areas are designed adequately to support the load of the casks. 10 C.F.R. § 72.212(b)(2). In addition, the utility must determine whether use of casks involves any "unreviewed facility safety question", *id.* at § 72.212(b)(4), and must modify the physical security organization and program for the utility to account for the storage of spent fuel. *Id.* at § 72.212(b)(5)(i). Finally, the utility must assure that its use of the cask falls within the terms of the cask's Certificate of Compliance. *Id.* at § 72.212(b)(2)(i).

C. The NRC Amends Subpart K in 1993 to Add the VSC-24 Casks to the Approved List of Casks/Consumers Invokes Subpart K.

On June 26, 1992, the NRC published notice of its intent to amend Subpart K by adding, for the first time, the VSC-24 casks to the approved list of casks (the "1993 amendment"). *Kelley v. Selin*, 42 F.3d at 1506. Consumers also provided notice, for the first time, that once the VSC-24 was added to the approved list of casks in Subpart K, it intended to use the VSC-24 casks under the general license. *Id.*

While the proposed 1993 amendment to Subpart K adding the VSC-24 cask was pending, Consumers advised the NRC that the fuel it intended to store in the VSC-24 casks, and which it was licensed to possess under its operating license, was not compatible with the fuel listed in the VSC-24's Certificate of Compliance. *Id.* at 1506. In response to that notice, the NRC amended the Certificate of Compliance for the VSC-24 to allow the use of the type of fuel generated at Palisades. In addition, while the 1993 amendment to the 1990 rule was pending, Consumers submitted a set of revisions to the Palisades security plan, and later a set of revisions for an emergency plan relating to the VSC-24 cask. *Id.* The NRC made findings that both plans were acceptable.

In responding to the written comments about the VSC-24 casks and the proposed 1993 amendment, many of which were directed to the Palisades site, the NRC clarified and expanded upon its 1990 regulatory scheme -- which had never before been applied -- and responded to numerous comments raising questions about the extent to which Subpart K could be used to circumvent public involvement in cask approval decisions. 58 Fed. Reg. 17,949, 17,951, 17,957, 17,959, 17,962-63 (April 7, 1993). On April 7, 1993, the NRC published a new final rule amending Subpart K, adding the VSC-24 casks to the approved list of casks, and amending the "general license" afforded by Subpart K to allow reactors storing their high level nuclear wastes to do so in VSC-24 casks. *Id.*

D. Proceedings Below.

On May 4, 1993, three days before the amendment to Subpart K adding the VSC-24 casks was to become final, Petitioners Kelley, Read, Perman, Kimmelman and Lake Michigan Federation filed a complaint and motion for temporary restraining order against the NRC and its officials in the United States District Court for the Western District of Michigan. Petitioners alleged in their complaint that they were directly affected, for the first time, in 1993, by the NRC's actions amending Subpart K to allow the storage of high level nuclear waste at Palisades in VSC-24 casks to be constructed near their property. As Petitioners claimed, the use of these outdoor casks affects their property and its value, potentially endangers their health and safety, and directly impacts the environment where they live. Petitioners were also particularly concerned that, for the first time, the NRC was approving the storage of high level nuclear waste in the untested VSC-24 cask, with no environmental analysis of the irradiated waste storage site: a sand dune area within 150 yards of the fragile Lake Michigan ecosystem.

The district court dismissed the complaint on jurisdictional grounds, holding that the complaint was essentially a challenge to the NRC's final rule, as to which only a court of appeals, not a district court, could invoke jurisdiction. (App. 41a-52a.) Pursuant to 28 U.S.C. § 1631, the district court consequently transferred the matter to the United States Court of Appeals for the Sixth Circuit for that Court's consideration. (App. 53a-54a.) Petitioners then filed a motion for an emergency stay of the effectiveness of the 1993 amendment to Subpart K, which the Sixth Circuit denied. Petitioners also filed a notice of appeal from the district court's dismissal on jurisdictional grounds. Petitioners Kelley, Lake Michigan Federation, and Don't Waste Michigan also filed a petition for review of the April 7, 1993 final rule. The Sixth Circuit consolidated all of the actions for review.

(i) The Parties' Presentations to the Sixth Circuit.

On appeal in the Sixth Circuit, Petitioners argued that the NRC had violated Section 189(a) of the AEA, 42 U.S.C. § 2239(a). Specifically, Petitioners contended that they had been improperly denied an adjudicatory hearing on the 1993 amendment to the general license granted by Subpart K, because (i) the 1993 amendment allowed, for the first time, the use of VSC-24 casks at Palisades and (ii) the NRC's 1993 determination was tailored specifically to allow use of the VSC-24 casks at Palisades. Accordingly, Petitioners sought an opportunity to demonstrate the necessity for a hearing on those aspects of the NRC's action relating to the use of the casks at Palisades that involved site-specific issues. Petitioners argued that the NRC, rather than engaging only in a generic rulemaking, had in fact made a series of site-specific findings concerning the utilization of VSC-24 casks at Palisades which amended the Palisades license and, under the AEA and established case law, triggered Petitioners' hearing rights.

In that regard, Petitioners also challenged the framework of Subpart K as applied concretely to them in 1993. Petitioners submitted that the NRC relied, commented, and expanded on the 1990 framework as its basis for denying Petitioners' hearing rights in 1993.

Finally, Petitioners challenged the NRC's refusal to conduct any site-specific environmental inquiry at Palisades, as required by NEPA, pointing out that the five-page environmental assessment prepared by the NRC did not concern the use of VSC-24 casks at Palisades and failed entirely to examine the use of those casks in an area characterized by the State of Michigan as a high risk erosion area. Petitioners also noted that the original environmental impact statement originally prepared for Palisades in 1971 did not address the possibility of outdoor storage of spent fuel. Petitioners thus contended that the NRC had failed to take the necessary "hard look" required by NEPA.

In their responsive briefs, the NRC argued that Petitioners were barred from challenging the framework of the 1990 rule by the sixty-day statute of limitation in the Hobbs Act. 28 U.S.C. § 2344.[2] The NRC and Consumers also cited Section 218(a) of the NWPA, 42 U.S.C. § 10198(a), arguing that Congress explicitly authorized the NRC to issue general licenses for the storage of spent fuel, and that such licenses could be issued through a generic rulemaking proceeding. The NRC and Consumers contended that the NWPA eliminates any right to a site-specific hearing on the license granted to a particular utility to store waste in one of the casks on the approved list in Subpart K. The NRC and Consumers also argued that hearing rights under the AEA are only triggered by changes to a utility's license. Because they contended that none of the site-specific issues with the VSC-24 involved changes to the Palisades license, they claimed that no hearing on any of those site-specific issues was required, nor was any site-specific environmental inquiry required under NEPA.

(ii) Post-Filing Presentations.

After briefing before the Sixth Circuit was completed in December 1993, but before oral argument, several extraordinary events occurred with respect to the storage of high level nuclear waste outdoors at Palisades, which appeared to undermine completely the NRC's legal position. First, in December 1993, the Director of Region V for the United States Environmental Protection Agency ("USEPA") wrote to the NRC regarding the use of the VSC-24 cask at Palisades. In his letter, the USEPA Director stated:

> We believe the potential for significant impact to Lake Michigan . . . is real and was not fully assessed in the generic

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[2] Consumers, but not the NRC, also asserted that Petitioners lacked standing to bring the appeals, including the Petition for Review. The Sixth Circuit rejected this claim and held that Petitioners have standing. *Kelley v. Selin* 42 F.3d at 1507-1510.

> environmental assessment prepared for the dry cask storage process . . . . The site specific conditions and the valuable resources of Lake Michigan . . . warrant a full and complete evaluation of the impacts and the review of this analysis by other federal and state agencies as well as the interested public.

(App. 67a-68a.)

Second, in February 1994, an NRC soils expert, Dr. Ross Landsman, wrote to the NRC's Chairman, with respect to the risk associated with the storage of high level wastes at Palisades, stressing the need for a site-specific inquiry at Palisades because of the risk of earthquakes and other environmental factors. Dr. Landsman advised that NRC officials involved in only generic tasks do not "realize the catastrophic consequences of their continued reliance on their current ideology." (App. 73a.)

Shortly after Dr. Landsman sent his letter, the NRC, pursuant to Federal Rule of Appellate Procedure 28(j), submitted a letter to the Sixth Circuit authored by one of its regional directors and addressed to Dr. Mary Sinclair, a representative of Petitioner Don't Waste Michigan. In its letter to Dr. Sinclair, the NRC indicated that it was undertaking an internal site-specific safety inquiry at Palisades to determine the adequacy of an analysis prepared by Consumers concerning the high risk erosion area and shifting sand dunes upon which the cask pad at Palisades had been placed. (App. 74a-77a.) Predictably, that internal review, which the NRC completed just two weeks before oral argument, found that, although various critical site-specific issues had not been sufficiently scrutinized, none posed such severe safety risks that cask use should be halted at Palisades. At no time, however, did the NRC subject its new site-specific findings to public scrutiny in a hearing under Section 189 of the Atomic Energy Act or supplement any of its environmental analyses or review under NEPA.

Third, In August 1994, Consumers wrote to the Sixth Circuit, and advised the Court that Consumers' representatives had detected

a crack in a weld of a steel liner for the fourth VSC-24 cask loaded at Palisades. Consumers advised the Court that it had decided to remove spent fuel from the damaged cask and insert it into another cask. (App. 77a.) To date, unloading of the damaged cask has never occurred because of previously unresolved safety problems in the unloading of spent fuel from the cask. (App. 79a-82a.)

(iii) The Sixth Circuit's Opinion.

In its decision issued on January 11, 1995, the Sixth Circuit rejected Petitioners' argument that the NRC had made site-specific findings and was thus obligated to hold hearings and engage in additional NEPA analysis. In reaching its decision, the Sixth Circuit made no mention of any of the site-specific issues that had dominated much of the discussion during oral argument, and which were brought to the Court's attention by the NRC and Consumers in their Rule 28(j) filing. The Court made no mention, while the appeal was pending, of the NRC's investigation of Consumers' conclusions about the sand dunes, and said nothing about Dr. Landsman's letter or about the fact that Consumers had identified a leak in one of the welds of the casks, but had yet to unload the damaged cask.

Instead of addressing these issues, the Court relied on, among other things, two key legal conclusions, the first of which the Court relegated to a lengthy footnote. The Sixth Circuit concluded that to the extent Petitioners' complaint involved a challenge to the basic framework of the 1990 rule, that challenge was barred by the sixty-day limitation in the Hobbs Act, 42 U.S.C. 2344. The Court ruled that (i) neither this Court's ripeness analysis in *Reno v. Catholic Social Services*, ___ U.S. ___, 113 S. Ct. 2485 (1993) or *Lujan v. National Wildlife Fed'n*, 497 U.S. 871 (1990), (ii) nor rulings of the D.C. Circuit allowing rule challenges in analogous circumstances, allowed Petitioners to challenge the 1990 rule as part of its challenge to the 1993 rulemaking proceeding which amended Subpart K.

Second, the Sixth Circuit concluded that the generic rulemaking proceeding and environmental inquiry conducted by the NRC regarding the licensing of the VSC-24 cask at Palisades was adequate under the AEA and NEPA, even though there has never been a site-specific hearing or environmental analysis conducted at Palisades relating to the storage of high level waste in any type of cask, let alone the VSC-24 cask.

REASONS FOR GRANTING THE WRIT

Certiorari should be granted on the questions presented by this petition for the following reasons: 1) the judgment below is inconsistent with this Court's prior decisions regarding when a challenge may proceed to a federal regulation by those first concretely affected by the regulation more than sixty days after its promulgation; 2) to resolve a conflict between the Sixth Circuit and the D.C. Circuit as to the question of what actions by a federal agency are sufficient to constitute renewed agency action, such that review of a previously finalized regulation should be reopened; and 3) to resolve the issue of whether Congress intended the NWPA to (i) eliminate the need for the NRC to conduct a site-specific environmental inquiry before a utility is authorized to store highly radioactive nuclear waste outside its nuclear reactor site, or (ii) eliminate an affected party's right to a hearing on site-specific issues associated with the licensing of dry cask storage at a particular site.

Each of these issues implicates critically important questions of law and public policy. There is no dispute that the fuel storage pools holding the high level radioactive wastes at dozens of our nations' nuclear reactor sites are close to capacity. Faced with this storage problem, many more reactor sites over the coming years will undoubtedly seek to store their irradiated waste outdoors in casks like the VSC-24 cask.

The Sixth Circuit's interpretation of the NWPA gives a green light to every nuclear reactor in the United States to become a

permanent high level nuclear waste storage facility without any public hearings under the AEA or environmental reviews under NEPA. Moreover, if this Court defers review of this question for even a few years, and other federal circuits or this Court determine later that the NRC's view of the NWPA is too expansive, the die will have been irretrievably cast: Contrary to the AEA and NEPA, the public will have been unlawfully shut out from effective input regarding the storage of high level nuclear waste at every nuclear power plant now operating.

I. THE SIXTH CIRCUIT'S DETERMINATION THAT PETITIONERS ARE BARRED FROM CHALLENGING A 1990 NRC REGULATION WHICH FIRST CONCRETELY AFFECTED THEIR INTERESTS IN 1993 PRESENTS AN ISSUE WORTHY OF THIS COURT'S REVIEW.

The Sixth Circuit concluded below that Petitioners were barred from challenging portions of Subpart K that were adopted in 1990 because "petitioners should have asserted such a claim within the 60 day period allowed by the Hobbs Act. 28 U.S.C. 2344." *Kelley v. Selin*, 42 F.3d at 1515 n.3. The Sixth Circuit determined that the sixty-day limitation in the Hobbs Act is a statutory bar to claims falling outside of the sixty-day period, irrespective of whether Petitioners' interests were affected for the first time by subsequent agency action.

The Sixth Circuit's ruling conflicts with this Court's previous determinations concerning when a challenge to a federal regulation is ripe for review. *See Reno v. Catholic Social Services*, 113 S. Ct. 2485 (1993); *Abbott Laboratories v. Gardner*, 387 U.S. 136 (1967); *Gardner v. Toilet Goods Ass'n*, 387 U.S. 167 (1967). Moreover, although the Sixth Circuit purported to distinguish the D.C. Circuit's prior decisions, *e.g.*, *Edison Elec. Institute v. EPA*, 996 F.2d 326 (D.C. Cir. 1993), its determination that Petitioners are time-barred from challenging a 1990 regulation squarely conflicts with established D.C. Circuit precedent. This Court should grant

a writ of certiorari so that it can resolve the conflicts on the question of ripeness created by the Sixth Circuit's decision below, and in order to resolve the conflict between the Sixth Circuit and the D.C. Circuit concerning the applicability of the reopener doctrine.

A. The Sixth Circuit's Determination Barring Petitioners' Challenge to the 1990 Rule Conflicts With This Court's Prior Decisions in *Reno v. Catholic Social Services* and *Lujan v. National Wildlife Fed'n*.

In a series of cases beginning with *Abbott Laboratories v. Gardner*, 387 U.S. 136, 152-154 (1967), this Court has provided guidance as to when a challenge to a federal regulatory scheme is ripe for judicial review. In *Abbott Laboratories*, and its companion cases, *Toilet Goods Ass'n v. Gardner*, 387 U.S. 158, 162-163 (1967) and *Gardner v. Toilet Goods Ass'n*, 387 U.S. 167, 171-173 (1967), the Court held that agency action is ripe for review if it results in a substantive rule that requires a party immediately to take some specific action. However, the Court also has ruled that final agency action ordinarily would not present a ripe controversy if the impact of that regulation could not be felt immediately by those subject to it in conducting their day to day affairs. *Toilet Goods Ass'n*, 387 U.S. at 162-166.

In *Lujan v. National Wildlife Fed'n*, 497 U.S. 871, 892 (1990), the Court amplified its earlier decisions regarding the ripeness of a challenge to a federal regulation. In *Lujan*, the Court determined that the legality of the Bureau of Land Management's land withdrawal review program was a "rule of general applicability," and therefore was not ripe for judicial review. In so holding, the Court reviewed its prior decisions in *Abbott Laboratories* and *Toilet Goods Ass'n* and concluded that a regulation is not ripe for judicial review "until the scope of the controversy has been reduced to more manageable proportions, and its components fleshed out, by some concrete action applying the regulation to the claimant's situation in a fashion that harms or threatens to harm him." *Id.* at 891.

Similarly, in *Reno v. Catholic Social Services*, ___ U.S. ___, 113 S. Ct. 2485, 2496 (1993), this Court again found, in the context of several class action challenges to a series of Immigration and Naturalization Service regulations, that challenges to a rule of general applicability would ripen for review with respect to each class member only after a particular class member affirmatively took steps that would effectively apply the regulation against the class member.

Here, this Court's ripeness jurisprudence, as set forth in *Lujan* and *Reno*, is in conflict with the Sixth Circuit's judgment below. Petitioners asserted on appeal that the 1993 NRC action amending Subpart K so as to apply it specifically to their interests constituted the necessary "concrete action" that, under *Reno* and *Lujan*, warranted the determination that this case is ripe for review. In 1990, during the proceedings relating to the adoption of Subpart K, the VSC-24 cask was not even on the authorized list of casks authorized by Subpart K, and there was no discussion whatsoever by the NRC in its Subpart K rulemaking about Palisades.[5]

Other actions by the NRC demonstrate that the 1993 rulemaking proceeding first constituted a concrete application of Subpart K affecting Petitioners in 1993. Under the general framework of Subpart K adopted in 1990, Consumers could not use the VSC-24 cask at Palisades until the NRC issued a Certificate of Compliance to the manufacturer. That Certificate was not issued until May 1993. In addition, it was not until 1993 that Consumers

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[5] There was extensive discussion in 1990 about those subjects in response to the Palisades application -- which was withdrawn by Consumers -- for a license to use the VSC-24 cask at Palisades. That proceeding was occurring at the same time that the NRC was finalizing Subpart K. Petitioners participated in the Palisades license proceeding after the NRC invited "interested parties" to make appropriate requests for a hearing on the application. Not surprisingly, those Petitioners did not participate in the 1990 rulemaking regarding Subpart K because, unlike the Palisades licensing proceeding, the generic rulemaking was not concretely affecting Petitioners' interests and involved neither the VSC-24 casks nor Palisades.

invoked the provisions of Subpart K by, among other things, giving notice to the NRC of its intent to use the VSC-24. 10 C.F.R. § 72.212(b)(i), determining (incorrectly) that there were no previously unreviewed safety questions, *id.* at § 72.212(b)(4), and finalizing a modified security and emergency preparedness plan relating to the use of the VSC-24 casks. All of those steps were directly associated with the addition of the VSC-24 cask to the approved list, which, when finalized in 1993, constituted a "concrete action" adversely affecting Petitioners interests for the first time.

In barring Petitioners' challenge to the 1990 regulation, the Sixth Circuit suggested that there are reasons why this Court's ripeness arguments in *Lujan* and *Reno* are not controlling. First, the Sixth Circuit construed this Court's decision in *Lujan* as holding that, where a substantive statute specifically authorizes a challenge to an agency regulation, a party need not demonstrate that he is aggrieved by the regulation. *Kelley v. Selin*, 42 F.3d at 1515 n.3. According to the Sixth Circuit, the Hobbs Act is such a substantive statute because it requires a party to lodge a challenge within sixty days of agency action. Under this analysis, Petitioners are barred from challenging the regulation outside of that time frame, even if later agency action first triggers application of the previously adopted rule to Petitioners.

There are at least two fatal flaws in the approach employed by the Sixth Circuit, which, if left unreviewed, will have enormous impact on those desiring to challenge agency action that is first applied to them even years down the road. First, the Sixth Circuit's interpretation of *Lujan* does not recognize that the ripeness issues discussed by the Court in *Abbott Laboratories*, *Lujan*, and *Reno* are essentially *jurisdictional* requirements which require a controversy actually to exist before a challenge can be ripe for challenge. *See generally*, *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 112 S. Ct. 2130, 2142-43 (1992) (even when underlying statute by Congress provides every citizen a right to challenge agency action, Article III

jurisdiction is lacking absent some showing of concrete interest being adversely affected). In *Lujan*, the Court did note that some statutes authorize judicial review of final agency action before the concrete effects of the regulation are felt. 497 U.S. at 891. However, that decision did not determine, as the Sixth Circuit seemed to suggest, that whenever a statute, such as the Hobbs Act, makes a final rule of the NRC reviewable, all challenges to that rule are ripe as soon as the rule becomes final, irrespective of any Article III barrier that might be presented. The Sixth Circuit's suggestion is contrary to this Court's holding in *Defenders of Wildlife*. Under the Sixth Circuit's view, courts would be saddled with having to review disputes where the controversy is in fact only hypothetical, as Petitioners' challenge to Subpart K would have been in 1990. *Accord, Union of Concerned Scientists v. U.S. Nuclear Regulatory Com'n*, 920 F.2d 50, 56-57 (D.C. Cir. 1992) (in denying facial challenge to an NRC regulation, courts are unwilling to consider hypothetical application of rules but rather only actual application).

The Sixth Circuit's ripeness analysis also does not square with the Hobbs Act itself, which specifically allows challenges to a final order only by a "party aggrieved by the final order." 28 U.S.C. § 2344; 28 U.S.C. § 2342(4). The Sixth Circuit's suggestion that *Lujan* eliminates the element of "concrete action" from the ripeness doctrine when there is final agency action is a question this Court has not yet squarely resolved. Granting the writ will afford the Court an opportunity to clarify this issue.

The Sixth Circuit did not find the ripeness doctrine under *Reno* and *Lujan* controlling for the additional reason that Palisades was free in 1990 to use the casks then on the approved list, and to invoke the provisions of Subpart K after the promulgation of the 1990 rule. Thus, the Sixth Circuit concluded, the adoption of Subpart K in 1990 actually implicated Petitioners' interests. *Kelley v. Selin*, 42 F.3d at 1515 n.3 ("after promulgation of the rule, the very procedures about which petitioners now complain

were in place, and any civilian reactor in the nation, including Palisades, was free to use the approved storage systems."). The Sixth Circuit's reading of the *Reno* analysis, however, runs counter to the plain holding of that case.

In *Reno*, this Court determined that the regulations at issue, like the regulations under Subpart K, required a party to take certain affirmative steps to obtain the benefit of those regulations -- in *Reno*, the right to apply for resident status; here, the right of the utility to store high level nuclear waste. The *Reno* Court recognized that a claim does not ripen into a justiciable controversy until affirmative steps are taken to invoke the regulation. Here, it cannot be disputed that the NRC first applied Subpart K to Palisades in 1993 by making findings about the emergency and security plans, accepting Consumers' representations that there were no unreviewed safety questions, and by adding the VSC-24 cask to the approved list of casks. When that application was made in 1993, Petitioners' right to challenge the 1990 regulations became concrete.

This Court should grant certiorari to resolve the inconsistency between the Sixth Circuit's ripeness analysis and this Court's analysis in *Reno* and *Lujan* and their predecessor decisions.

B. The Sixth Circuit's Determination Barring a Challenge to a Rule Because of the Sixty-Day Limitations Period in the Hobbs Act Conflicts with Decisions of the D.C. Circuit Recognizing the Reopener Doctrine.

In addition to creating confusion concerning *Lujan* and *Reno*, the Sixth Circuit's determination to bar Petitioners from challenging the NRC's renewed application of a 1990 rule is squarely in conflict with several decisions of the D.C. Circuit. *See Association of American Railroads v. I.C.C.*, 846 F.2d 1465, 1473 (D.C. Cir. 1988) and progeny, *State of Ohio v. U.S. E.P.A.*, 838 F.2d 1325, 1328 (D.C. Cir. 1988); *Public Citizen v. Nuclear Regulatory Com'n*, 901 F.2d 147, 150-51 (D.C. Cir. 1990), *cert. denied sum nom.*, *Nuclear Management and Resources Council, Inc. v. Public Citizen*, 498 U.S. 992 (1990); *Edison Elec. Institute v. U.S. E.P.A.*,

996 F.2d 326, 331 (D.C. Cir. 1993). This important issue should be resolved by the Court, in order to provide guidance to both agencies and affected parties as to when agency action amounts to a "reopening" of an agency's prior determination so as to allow a challenge to the original regulation.

In *Association of American Railroads v. I.C.C.*, 846 F.2d 1465, 1473 (D.C.Cir. 1988), the D.C. Circuit recognized the so-called reopener doctrine, *i.e.*, the general principle that if an "agency has opened the issue up anew, even though not explicitly, its renewed adherence is substantively reviewable." In *State of Ohio v. U.S. E.P.A.*, 838 F.2d 1325, 1328 (D.C. Cir. 1988), the D.C. Circuit reiterated the reopener rule, by fashioning four benchmarks to determine whether an agency has reopened a previously decided issue: the agency (1) proposes to make some change in its rules or policies, (2) calls for comments only on new or changed provisions, but at the same time (3) explains the unchanged, republished portions, and (4) responds to at least one comment aimed at the previously decided rule. The critical inquiry is whether the agency has implicitly or explicitly reopened an issue. *Public Citizen v. Nuclear Regulatory Com'n*, 901 F.2d 147 (D.C. Cir. 1990).

The Sixth Circuit concluded that the reopener doctrine did not apply because, in 1993 in this case, the NRC was not "making drastic changes that have the effect of restructuring its earlier rules," and because the NRC purportedly did not reconsider the propriety of the 1990 framework. *Kelley v. Selin*, 42 F.3d 1516 n.3. That analysis does not square with the facts.

As an initial matter, the Sixth Circuit's analysis does not account for the fact that the NRC published extensive comments about the 1990 framework in its 1993 rulemaking, one of the primary criteria under the D.C. Circuit's analysis that must be considered in determining whether the reopener doctrine applies. *State of Ohio v. U.S.E.P.A.*, 838 F.2d at 1328, citing *State of Montana v. Clark*, 749 F.2d 740 (D.C. Cir. 1984), *cert. denied*, 474 U.S. 919 (1985). Second, the Sixth Circuit's standard, *i.e.*,

whether the new rule constitutes a "drastic" change to the older regulation, is much narrower than the standard articulated by the D.C. Circuit. That Court has stated that the standard for reopening review of a regulation is whether an agency makes *some* proposed change in its regulation and only calls for comment on the changed rule, and also explains the unchanged portion of the regulation and publishes comments about the unchanged regulation. *Public Citizen*, 901 F.2d at 147.

That is precisely what has happened here. The NRC proposed a change to Subpart K to add the VSC-24 cask to the approved list, but proceeded first to provide a lengthy explanation and detailed clarification of why Subpart K supposedly provided authority to add the cask to this list without any need for a site-specific hearing or environmental inquiry. It then published responses to comments -- some from Petitioners -- concerning the scope of Subpart K as applied to Palisades and the VSC-24 cask. In addition, the NRC modified Subpart K to facilitate use of the VSC-24 cask at Palisades. By any measure, therefore, this is exactly the type of situation that the D.C. Circuit has found to implicate the reopener rule. However, in conflict with the D.C. Circuit's application of the rule, the Sixth Circuit found that the doctrine should not apply. This Court should grant certiorari to resolve this conflict on this fundamental and recurrent problem in administrative law.

II. THIS COURT SHOULD RESOLVE WHETHER THE NUCLEAR WASTE POLICY ACT ALLOWS THE LONG-TERM STORAGE OF HIGH LEVEL NUCLEAR WASTE OUTSIDE INDIVIDUAL NUCLEAR REACTOR FACILITIES WITHOUT PUBLIC HEARINGS OR SITE-SPECIFIC ENVIRONMENTAL STUDIES.

The Sixth Circuit determined that the NRC may license the storage of spent nuclear fuel in concrete casks outside every nuclear reactor in the United States, without holding site-specific hearings or performing site-specific environmental analyses. The Sixth Circuit concluded that Section 218(a) of the NWPA specifically

authorizes the NRC to eliminate these inquiries, which are mandated by the AEA and NEPA. This Court, which has never addressed the scope of Section 218(a) of the NWPA, should grant a writ of certiorari to resolve the issue of how the AEA, NEPA, and the NWPA should be harmonized.

A. The Sixth Circuit's Decision Has The Effect of Allowing The Nuclear Waste Policy Act To Override Hearing Rights Provided By the Atomic Energy Act.

The AEA entitles interested parties to hearings regarding licensing decisions. Under Section 189(a) of the AEA, "[i]n any proceeding . . . for the granting, suspending, revoking, or amending of any [nuclear reactor] license or construction permit . . . the Commission shall grant a hearing upon the request of any person whose interest may be affected by the proceeding, and shall admit any such person as a party to such proceeding." 42 U.S.C. § 2239(a)(1)(A).

In the proceedings below, Petitioners did not contend that the NRC is required to hold an on-the-record hearing on every conceivable issue relating to licensing decisions. *See Heckler v. Campbell*, 461 U.S. 458, 467 (1983) ("[E]ven where an agency's enabling statute expressly requires it to hold a hearing, the agency may rely on its rulemaking authority to determine issues that do not require case-by-case consideration."). However, prior to the Sixth Circuit's decision, there was little doubt that when a utility's license is amended, *or* if some action by the NRC or a utility involves a previously unresolved safety issue, the NRC must afford an interested party the opportunity to seek a hearing on any issues not already decided by a generic rulemaking. *Cf. Nuclear Information Resources Service v. U.S. Nuclear Regulatory Com'n*, 969 F.2d 1169, 1173 (D.C. Cir. 1992) (*en banc*); *Union of Concerned Scientists v. U.S. Nuclear Regulatory Com'n*, 735 F.2d 1437, 1439 (D.C. Cir. 1984), *cert. denied sum nom. Arkansas Power & Light Co. v. Union of Concerned Scientists*, 469 U.S. 1132 (1985).

The issue presented here concerns how far the NRC may go in limiting the scope of the hearing rights provided by the AEA. Petitioners submit that the Sixth Circuit's decision has stretched the *Heckler v. Campbell* rationale beyond its breaking point, the result of which is an irreconcilable conflict between the provisions of three federal statutes (namely the NWPA, the AEA, and NEPA).

In issuing Subpart K in 1990, and in the amendment adding the VSC-24 cask in 1993, the NRC engaged in a generic proceeding which purported to license not only the use of the VSC-24 cask, but also the storage of high level nuclear waste outdoors by every civilian nuclear reactor in the United States. As support for its authority to issue these licenses for both the technology and storage of high level waste through a generic proceeding, the NRC has pointed to Section 218(a) of the NWPA. That section provides, in pertinent part, as follows:

> The Secretary shall establish a demonstration program . . . for the dry storage of spent nuclear fuel at civilian nuclear power reactor sites, with the objective of establishing one or more technologies that the [NRC] may, by rule, approve for use at the sites of civilian nuclear reactors without, *to the maximum extent practicable*, the need for additional site specific approvals by the [NRC].

42 U.S.C. § 10198(a) (emphasis added).

The NRC and Consumers argued below that Section 218(a) permits the NRC generically to license not just the construction of the cask technology, but also the additional storage of nuclear waste outdoors at each nuclear reactor site. Petitioners agree that, as set out in Section 218(a), and consistent with the Court's earlier instruction in *Heckler v. Campbell*, a truly generic issue can be resolved in a rulemaking proceeding short of conducting an adjudicatory hearing. However, Section 218(a) does not permit the NRC to license generally the use of the technology at a specific plant where, as here, there are unique site-specific issues involved.

The plain reading of Section 218(a) is that approval of the technology without site-specific inquiry can be accomplished only "*to the maximum extent practicable.*" There are, in other words, express statutory limits on the NRC's generic licensing powers, which the Sixth Circuit has disregarded.

Petitioners' reading of Section 218(a) is not only supported by the express language of the statute, but also by the legislative history and the NRC's own implementing regulations. The House Committee on Interior and Insular Affairs explained that the purpose of the NWPA is to allow

> the NRC to develop special, streamlined proceedings for technologies such as spent fuel storage casks which can be constructed in factories and moved to reactor sites in modules. Generic licensing for such technologies would seem to be possible to a large extent, *although site-specific adaptations would require review.*

H. Rep. No. 491, Part 1, 97th Cong., 2d Sess. 41 (1982) (emphasis added). In addition, in promulgating Subpart K, the NRC itself recognized that "the use of a certified cask at a particular site may entail the need for *site-specific licensing action.*" 55 Fed. Reg. 29,182 (July 18, 1990) (emphasis added).

The NRC's adoption of Subpart K and its amendments, and the subsequent licensing of the use of the VSC-24 cask at Palisades, has involved a host of site-specific issues. Through Subpart K, the use of the VSC-24 cask at Palisades has required, among other things, a determination of whether previously unresolved safety questions exist concerning placement of the casks within 150 yards of Lake Michigan, the preparation of modified security and emergency plans, and an analysis of whether the cask storage pad is sufficient to hold the weight of the 130 ton casks when placed on sand dunes. Despite these site-specific concerns, the Sixth Circuit nonetheless concluded that because of Subpart K's generic approach, Petitioners were not entitled to a hearing under the AEA. *Kelley v. Selin*, 42

F.3d at 1520. That analysis conflicts with the approach employed by the D.C. Circuit when dealing with the issue of generic proceedings, and ignores the parameters set out by this Court in *Heckler v. Campbell*.

In *Nuclear Information Resources Service v. NRC*, 969 F.2d 1169, 1173 (D.C. Cir. 1992) (*en banc*) ("*NIRS*"), the D.C. Circuit affirmed an NRC regulation that revised licensing procedures for nuclear reactors, finding it not inconsistent with Section 189 of the AEA. The regulation at issue limited the scope of site-specific licensing hearings by preapproving particular nuclear reactor designs. *NIRS*, 969 F.2d at 1171. Although upholding the regulation, the D.C. Circuit nevertheless recognized that Section 189 "plainly requires a 'hearing upon request' before the 'granting' of a license." *Id.* at 1173. Significantly, the D.C. Circuit found that although the NRC may preapprove reactor designs via rulemaking, "the applicant [in each case] must still show . . . that the certified design can be successfully linked to site-specific design elements. *The Commission is obliged to hold hearings and make findings on this linkage.*" *Id.* at 1171 (emphasis added; citations omitted).

In another decision in conflict with the Sixth Circuit's analysis, the D.C. Circuit struck down an NRC regulation permitting licensing decisions to be made without regard to the results of emergency preparedness exercises. *Union of Concerned Scientists v. U.S. Nuclear Regulatory Com'n*, 735 F.2d 1437, 1442-43 (D.C. Cir. 1984) ("*UCS I*"), *cert. denied sum nom., Arkansas Power & Light Co. v. Union of Concerned Scientists*, 469 U.S. 1132 (1985). In *UCS I*, the D.C. Circuit held it impermissible for the NRC to "remove[] from the licensing hearing consideration of evidence that it considers relevant to a material issue in the section 189(a) proceeding as it has defined that issue." *UCS I*, 735 F.2d at 1443 (emphasis in original). *UCS I*, which directly follows from the analysis in *Heckler v. Campbell*, recognizes that statutory

hearings may not be limited to such a degree that they become meaningless.

These D.C. Circuit decisions are in irreconcilable tension with the Sixth Circuit's determination that Petitioners may be completely deprived of site-specific hearings. As in *NIRS*, the NRC has approved a generic design, and as in *NIRS*, the implementation of a new design has triggered specific questions of linkage that have not been resolved by the generic proceeding: *e.g.*, whether the cask pads which sit on the sand dunes at Palisades are adequate; whether the Palisades emergency plan and security plan are adequate; and whether Consumers has sufficient procedures in place to unload a damaged cask when the cask is already loaded on a pad next to the lakeshore. *NIRS* and *UCS I*, consistent with *Heckler v. Campbell*, hold that those site-specific linkage issues must be resolved through a Section 189 proceeding.

The Sixth Circuit's judgment below does acknowledge the D.C. Circuit's decisions in *NIRS* and *UCS I* but purports to distinguish them, by reasoning that those cases involved the licensing of larger and more complicated designs than a storage facility. Specifically, the Sixth Circuit stated that *NIRS* involved the construction of new facilities, whereas here, the NRC "is merely expanding the options for disposal of spent nuclear fuels." *Kelley v. Selin*, 42 F.3d at 1518. In fact, however, *NIRS* and *UCS I* draw no such distinction. Expanding the options for disposal of spent nuclear fuel amounts to licensing activity, just like the issuance of a construction permit, expansion of a wet pool, or licensing of a new reactor. Furthermore, the NRC action here represents a major and highly significant change from storing nuclear waste in wet pools inside a licensed reactor. Here, by contrast, Palisades will be storing, for the first time, highly radioactive nuclear waste outside the plant building in previously unlicensed 130 ton concrete casks located atop sand dunes (not on bedrock like the reactor itself) only 150 yards from Lake Michigan.

This Court should grant certiorari to resolve the conflicting approaches taken by the Sixth Circuit and the D.C. Circuit as to the extent to which a generic rulemaking proceeding can alleviate the need for site-specific inquiry. *UCS I* directly conflicts with the Sixth Circuit's holding that the Section 189(a) hearing requirement may be satisfied through generic rulemaking. The Court should grant certiorari to resolve this conflict.

B. The Sixth Circuit's Decision Has The Effect, In Conflict With Decisions of the Third Circuit, Of Allowing The Nuclear Waste Policy Act To Override The Procedural Requirements of the National Environmental Policy Act.

The NRC's general licensing scheme for storage casks has the additional effect of trampling NEPA's procedural obligations. NEPA requires all federal agencies, including the NRC, to consider the environmental impacts of and alternatives to proposed agency actions and, where significant, to prepare environmental impact statements ("EIS"). 42 U.S.C. § 4321; *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 349 (1989).

To determine whether an EIS is necessary, the agency must prepare an environmental assessment ("EA") indicating the rationale of its decision. 40 C.F.R. § 1508.9(a)(1). The NRC concedes that the promulgation of Subpart K was a proposed agency action requiring an EA. However, in adopting the general licensing scheme for storage casks, the NRC never prepared an individual EA or EIS for any site where the casks may be placed. Specifically, the NRC never performed any site-specific analysis under NEPA regarding the use of the VSC-24 cask at Palisades.[6] This case thus

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[6] Although the Sixth Circuit refers to the environmental study done when Palisades was issued a provisional license in the 1970s, the simple fact remains that no study has ever been done about the impact of storing waste outdoors at Palisades. The original study discussed the serious problems of transportability, but not outside storage. The reason storage was never analyzed was that the assumption was that spent fuel would be reprocessed.

raises the important question whether a generic rulemaking obviates the need for a site-specific EA.

Citing this Court's decision in *Baltimore Gas & Elec. Co. v. Natural Resources Defense Council, Inc.*, 462 U.S. 87, 101 (1983), the Sixth Circuit concluded that the NRC was not required to prepare a site-specific EA for the use of VSC-24 casks at Palisades, because the preapproval of concrete casks was a generic rulemaking which required no more than a general EA. In fact, however, the Sixth Circuit's decision is not consistent with the approach adopted in *Baltimore Gas*.

In reaching its conclusion that a generic determination regarding the VSC-24 cask was sufficient and alleviated the need for site-specific inquiry at Palisades, the Sixth Circuit did not find controlling the Third Circuit's analysis in *Limerick Ecology Action v. U.S. Nuclear Regulatory Com'n*, 869 F.2d 719 (3d Cir. 1989). In *Limerick*, the Third Circuit held the NRC could not rely upon a policy statement regarding generic severe accident mitigation design alternatives as a basis for failing to conduct an environmental inquiry into the impact of those generic designs at a specific site. The Third Circuit's analysis took note of this Court's decision in *Baltimore Gas*, in which the Court upheld an NRC finding that, in licensing proceedings for particular reactors, licensing boards should assume that the permanent storage of radioactive wastes generated by the reactor would have no significant environmental impact -- the so-called "zero-release" assumption. *Limerick*, 869 F.2d at 736-739. This Court's holding in *Baltimore Gas*, the Third Circuit reasoned, did not provide a basis for the NRC to avoid conducting a site-specific NEPA inquiry for a number of reasons. First, the generic determination in *Baltimore Gas* was made after the NRC conducted a rulemaking proceeding, whereas in *Limerick*, the determination was embodied in a policy statement. Second, the determination at issue in *Baltimore Gas* was in fact generic in that it assumed all waste would be stored permanently at one common

repository, whereas the generic design at issue in *Limerick* implicated site-specific issues. *Limerick*, 869 F.2d at 736-739.

In concluding that no-site specific inquiry was necessary in connection with the NRC's actions at Palisades, the Sixth Circuit attempted to distinguish *Limerick* by asserting that this case, like *Baltimore Gas*, involved a rulemaking proceeding as opposed to a policy statement. *Kelley v. Selin*, 42 F.3d at 1520. Because the generic determinations made about the VSC-24 cask were made during a rulemaking proceeding, the Sixth Circuit concluded that *Limerick* did not apply and the approach taken by the NRC was consistent with *Baltimore Gas*. In fact, however, the determination at issue here is inconsistent with *Baltimore Gas*.

Although the Sixth Circuit correctly notes that the *Limerick* court drew the rulemaking versus policy statement distinction, the Sixth Circuit made no mention of the second, more important, distinction drawn in *Limerick* -- that the determination at issue in *Baltimore Gas* involved the storage of waste at one common site, as opposed to storage at reactor sites across the country. *Limerick*, 869 F.2d at 738. "It is axiomatic," the Third Circuit stated, "that the generic approach of *Baltimore Gas*, will not suffice where the underlying issues are not generic" or are "insufficiently generic." *Limerick*, 869 F.2d at 738 & n.21 (recognizing that routine expansion of fuel storage is insufficiently generic among plants to justify generic treatment). In short, the Third Circuit, like the D.C. Circuit in its licensing decisions in *UCS I* and *NIRS*, held that where there is a legitimate question of site-specific linkage, the generic approach will not suffice. The Sixth Circuit's reading of NEPA and of *Baltimore Gas* directly conflicts with the Third Circuit's view. The Court should grant certiorari to resolve this issue.

There can be no dispute that the placement of the VSC-24 casks at Palisades has serious site-specific implications. First, there has never been an environmental inquiry conducted at Palisades regarding the placement of nuclear wastes in concrete casks outside the reactor complex -- an event not even contemplated when the

reactor was issued a provisional license in 1971, when the draft EIS was completed in 1972, or when the final EIS for Palisades was completed in 1978.

In addition, the USEPA itself, the agency charged with enforcing NEPA, has recognized that there are significant site-specific concerns at Palisades. In December 1993, the Administrator of USEPA Region V (the Region that includes Michigan) wrote a letter to the NRC about his concerns regarding the use of the VSC-24 cask at Palisades, in which he concluded the EA here was inadequate and that "the potential for significant impact to Lake Michigan . . . *is real and was not fully assessed* in the generic environmental assessment prepared for the dry storage process. . . ." (App. 67a-68a.) Moreover, in February 1994, Dr. Ross Landsman, an NRC soils expert, wrote to NRC chairman Dr. Selin regarding his concerns about cask storage at Palisades:

> The casks can either fall into Lake Michigan or be buried in the loose sand because of liquefaction. This event might be in the public's mind in view of what just happened in Southern California [*i.e.*, earthquakes and mudslides]. It is apparent that [the NRC] doesn't realize the catastrophic consequences of their continued reliance on their current ideology.

(App. 73a.)

In response to Dr. Landsman's concerns, the NRC conducted an internal site-specific safety analysis regarding the sand dunes, which is an acknowledgement by the NRC that there are site-specific issues at Palisades that demand inquiry under NEPA and the AEA. The Sixth Circuit's determination that the placement of the VSC-24 casks at Palisades was an issue sufficiently generic to avoid a site-specific inquiry does not square with either the facts presented, this Court's decision in *Baltimore Gas*, or the holding of the Third Circuit in *Limerick*. Certiorari should be granted to resolve the conflict, and to resolve the question of how the NWPA should be harmonized with the provisions of NEPA and the AEA.

CONCLUSION

For the reasons stated herein, Petitioners respectfully request that their petition for a writ of certiorari on the questions presented should be granted.

Respectfully submitted,

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APPENDIX

United States Court of Appeals for the Sixth Circuit, Opinion, January 11, 1995 . . . . . 1a-40a

United States District Court for the Western District of Michigan, Opinion and Order, May 10, 1993 . . . . . 41a-52a

United States District Court for the Western District of Michigan, Order, May 10, 1993 . . . . . 53a-54a

Statutes Involved

28 U.S.C. §§ 2342(4), 2344 (Hobbs Act) 55a

42 U.S.C. § 2239(a) (Atomic Energy Act) 56a

42 U.S.C. § 4321 (National Environmental Policy Act) 57a

42 U.S.C. § 10198 (Nuclear Waste Policy Act) . . 57a-58a

Federal Regulations Involved

10 C.F.R. §§ 72.210 to 72.220 . . . . . 59a-65a

Letter from U.S. EPA to James Taylor December 30, 1993 . . . . . 66a-67a

Letter from NRC to U.S. EPA January 30, 1994 . . . . . 68a-71a

Letter from Dr. Ross Landsman to Dr. Ivan Selin February 17, 1994 . . . . . 72a

Letter from NRC to Dr. Mary Sinclair March 25, 1994 . . . . . 73a-76a

Letter from Michael A. Carvin to Clerk of the U.S. Court of Appeal for the Sixth Circuit August 3, 1994 . . . . . 77a-78a

Letter from NRC to Dr. Mary Sinclair January 4, 1995 . . . . . 79a-82a

The *New York Times* Article February 15, 1995 . . . . . 83a-87a

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42 F.3d 1501

Frank J. KELLEY, Attorney General of the
State of Michigan; Herbert P. Read;
Norman W. Perman; Susan Kimmelman; the
Lake Michigan Federation; and Don't Waste Michigan,
Petitioners-Appellants,

v.

Ivan Selin; James R. Curtiss; E. Gail De Planque;
Forrest J. Remick; Kenneth C. Rogers;
United States Nuclear Regulatory Commission;
and United States of America,
Respondents-Appellees.

Consumers Power Company,
Intervenor-Respondent.

Nos. 93-1646, 93-1710, 93-3613 and 93-3749.

United States Court of Appeals,
Sixth Circuit.

Argued Oct. 11, 1994.
Decided Jan. 11, 1995.

Before: MILBURN, BOGGS, and NORRIS, Circuit Judges.

MILBURN, Circuit Judge.

This appeal involves four separate actions, consolidated for appeal. The actions docketed as Nos. 93-3613 and 93-3749 seek review of a Nuclear Regulatory Commission ("NRC") order approving use of a VSC-24 concrete cask for storage of spent nuclear fuels. The action docketed as No. 93-1646 is before this court from a transfer directed by the district court after it found that this court has proper subject matter jurisdiction. The remaining action, No. 93-1710, appeals the district court's holding that it lacked subject matter jurisdiction to review the NRC order and

grant relief for the alleged violations of the National Environmental Policy Act, 42 U.S.C. § 4321.

On appeal, the issues are (1) whether petitioners have standing to challenge the NRC's final rule permitting storage of spent nuclear fuels in the VSC-24 cask; (2) whether the NRC's addition of the VSC-24 storage cask to the list of approved systems at 10 C.F.R. § 72 (Subpart K), constituted a generic rulemaking or whether the NRC was required to conduct an "on-the-record" adjudicatory **42 F.3d 1504** hearing pursuant to § 189(a) of the Atomic Energy Act ("AEA"), 42 U.S.C. § 2239, and the Administrative Procedure Act, 5 U.S.C. § 553; (3) whether respondents made significant site-specific decisions regarding Palisades without granting a hearing on these decisions; and (4) whether the NRC complied with the National Environmental Policy Act ("NEPA"), 42 U.S.C. § 4321 *et seq.*, or whether it acted arbitrarily, capriciously or in abuse of its discretion in promulgating the final rule permitting use of the VSC-24 cask in reliance upon earlier environmental analyses assessing the impact of the rule change on nuclear reactor sites. For the reasons that follow, we affirm.

I.

A.

In 1982, Congress passed the Nuclear Waste Policy Act, which mandated that the Department of Energy ("DOE") construct a federal repository for the permanent storage of spent nuclear fuels. Nuclear Waste Policy Act of 1982, as amended in 1987, 42 U.S.C. ss 10101, *et seq.* Under the Act, the DOE was required to take title to spent fuels as early as 1998. Congress indicated, however, that producers of such waste are responsible for its storage, preferably at reactor sites, until the repository is completed. 42 U.S.C. § 10151(a)(1). Completion is now expected no earlier than 2015.

At the same time, Congress directed the Secretary of Energy to establish a demonstration program for dry storage of spent fuels at existing nuclear plants. 42 U.S.C. § 10198(a) ("s 218(a)"). The

program was intended to establish technologies that the NRC "may by rule, approve for use at the sites of civilian nuclear power reactors without, to the maximum extent practicable, the need for specific additional site-specific approvals by the Commission:" 42 U.S.C. § 10198(a). Thus, the demonstration program was expressly intended to provide the Commission a basis to approve various dry storage technologies for use at civilian reactors without site-specific hearings. In the Act, Congress provided that the agency was to establish procedures for the licensing of any technology approved under § 218(a). 42 U.S.C. § 10153. One of the technologies explicitly mentioned in § 218 was storage casks for spent nuclear fuel. The impetus behind Congress' action was the belief that existing on-site storage facilities at most reactors, which consist of pools for underwater storage, would be insufficient to meet storage needs prior to the opening of the federal repository. Moreover, the risk of transporting radioactive wastes to off-site facilities also raised some concerns. By 1987, the DOE had entered into three cooperative agreements with utilities to demonstrate a form of dry cask storage.

In 1990, the NRC promulgated 10 C.F.R. § 72 (Subpart K), which grants a general license to store nuclear fuel in approved casks at reactor sites, provided certain conditions are met. Thus, the NRC succeeded in eliminating the need for site-specific approvals. Under the new rule, utilities desiring to increase their on-site storage capability have the option of storing spent nuclear fuels in a cask approved by the NRC pursuant to the general license or applying for a site-specific license. The new rule listed four types of approved storage casks.

The NRC's 1990 rulemaking was accompanied by an Environmental Assessment ("EA") that concluded that the new technology would have no significant impact on the human environment. This finding was based in part on the fact that each site at which the casks would be used had already been the subject of an environmental impact statement in connection with the

licensing of the plant. 55 Fed.Reg. 29,190. Because the EA found that the proposed rule would not produce any significant effect on the environment, preparation of an environmental impact statement was not required.

Subpart L of the rule sets forth the procedure for adding new storage systems to the list of approved designs. Manufacturers seeking approval must submit to the agency a safety analysis report showing that the design is suitable for storage for at least 20 years. The manufacturer must conduct, or permit the NRC to conduct, whatever tests are deemed necessary and must conduct design, testing, fabrication and maintenance of **42 F.3rd 1505** the casks under a quality assurance program suitable to the NRC.

Palisades is a nuclear power reactor located on the eastern shore of Lake Michigan in Van Buren County, Michigan. It was licensed by the Atomic Energy Commission in September 1972. The reactor is owned and operated by Consumers Power Company ("Consumers"). As a by-product of its operations, Palisades creates spent fuel, which remains dangerous long after it is removed from the reactor. Until 1989, Consumers utilized a fuel pool facility for storage of its wastes at the Palisades plant. Such storage is permitted under the Palisades license. Around 1989, with its fuel pool filling to capacity, Consumers opted to try dry storage of spent fuel in the VSC-24 dry cask manufactured by Pacific Sierra. The ventilated storage cask is comprised of a concrete cask and a steel, seal-welded basket. The spent fuel is placed in the basket, and the basket is drained, decontaminated, filled with helium and welded shut. It is then loaded in the concrete cask, which is equipped with a metal liner. When fully loaded, each cask weighs 130 tons. After the cask is loaded, the entire container is transported to a concrete pad. At Palisades, the pad is located behind and above the nuclear generating facility and within approximately 150 yards of the shore of Lake Michigan. The nuclear generating facility, however, is located between Lake Michigan and the pad. Plaintiffs state that the site chosen is characterized by geologists as a high-risk

erosion area. Although Consumers' selection of the VSC-24 cask was in compliance with Michigan law,[1] its design had not, at that time, been tested at a nuclear reactor. The cask was selected, however, because it was expected to be a cheaper and more spacious method of storage than other systems.

On March 12, 1990, Palisades applied to the NRC for licensing authority to construct and maintain a dry spent fuel storage installation at its plant, using the VSC-24 casks. At the time of the application, the NRC had not issued the general license under 10 C.F.R. § 72 (Subpart K), and site-specific licensing was the only method of approval possible for civilian reactors. However, in July 1990, the NRC approved the general license, and Consumers withdrew its application for the specific license.

The NRC's initial response to Palisades was to advise it that the application did not comply with the NEPA, 42 U.S.C. § 4321, or NRC regulations. The NRC noted that the license application was deficient in failing to include a complete environmental report addressing site-specific issues at Palisades. On May 31, 1990, Palisades filed an amended environmental report. Thereafter, on July 13, 1990, the NRC published a notice in the *Federal Register* stating that Consumers had filed the environmental report and that the NRC intended to review the report to determine whether an environmental impact statement was warranted. In addition, the NRC invited members of the public whose interests would be affected by the grant of a license to apply for a hearing. The NRC received applications for a hearing, but before the agency took any action, Palisades gave notice that it was withdrawing its application.

On August 17, 1990, the NRC amendment to 10 C.F.R. § 72 (Subpart K) granting a general license to approved storage technologies became final. In response to requests for a hearing,

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[1] In 1989, the Michigan legislature approved the use of above-ground storage of spent fuels "at or near" nuclear power generating facilities with NRC approval. Mich. Comp. Laws § 325.491.

the NRC asserted that although the right to a hearing did exist as to the grant of a specific license, no such right existed in the case of a general license granted through an administrative, "generic rulemaking." 55 Fed.Reg. 29,182. The NRC did admit, however, that the peculiarities of a particular site might create the need for "site specific licensing action" involving a hearing. 55 Fed.Reg. 29,182. At the time the amendment became effective, the VSC-24 was not on the list of approved storage casks.

In early 1991, Consumers applied to the Michigan Department of Natural Resources for permission to construct a concrete pad on which storage casks could be located. Although Subpart L specifically explains that the final step in the approval process is the issuance of a certificate of compliance to the **42 F.3d 1506** manufacturer of a cask after the NRC concludes that certain safety standards are met, the manufacturer of the VSC-24 cask, Pacific Sierra, asked the NRC for an exemption to its regulations to allow construction of the VSC-24 casks for Palisades in April 1991, before a certificate of compliance was issued. Even though construction of a cask is not to begin until such a certificate has been issued, the NRC granted the exemption, allowing the manufacturer to begin building three metal baskets and eight concrete casks. Petitioners did not intervene at the time of the request for an exemption, the notice for which was published by the NRC. 56 Fed.Reg. 41,870 (1991).

On April 4, 1991, Pacific Sierra formally applied for a certificate of compliance for the VSC-24 cask, which certificate would have the practical effect of adding the cask to the list of approved storage bins. 10 C.F.R. § 72.214. A preliminary certificate was issued in April 1992. In June 1992, construction was completed on the VSC-24 casks to be used at Palisades. On June 26, 1992, the NRC published a notice to the public of its intent to amend the list of approved casks to include the VSC-24 cask and provided a 75-day period of public comment. 57 Fed.Reg. 28,645 (1992). The initial period of comment was

followed by an additional 30-day period after new information relating to the casks was made available to the public.

On December 30, 1992, petitioner Kelley communicated to respondent Selin, the NRC chairman, his request that the NRC hold a public adjudicatory hearing regarding the location of the casks, pursuant to § 189 of the AEA. His request was refused by the NRC, which claimed that such a hearing was unnecessary in a generic rulemaking action not focused exclusively on Palisades. However, the agency did conduct a three-hour meeting during which Michigan citizens were permitted to make oral statements. Although NRC officials were available for comment, no opportunity was afforded the speakers to question either the manufacturer's or Consumers' representatives. The director of the NRC's Office of Nuclear Material Safety remarked at the meeting that the agency action at issue was a generic rulemaking and that the Palisades plant was the first reactor to use the new casks but that at least two other reactors planned to utilize the new system.

As part of the proposed amendment adding the VSC-24 cask to the list of approved containers, the NRC stated that it had prepared an environmental assessment report relating to the proposed rule. The five-page report, which was explicitly tiered on prior environmental analyses relating to spent fuel storage, concluded that the casks would have no significant impact on the human environment. Some concerns were voiced to the NRC that it had failed to address any of the site-specific concerns relating to the Palisades location, but the NRC responded that no site-specific environmental analysis was required because the proposed amendment was generic and was not specifically aimed at Palisades.

On September 9, 1992, Consumers advised the NRC that the fuel permitted to be stored in the VSC-24 cask pursuant to the provisional certificate of compliance was incompatible with the spent fuel generated at Palisades. The fuel requirements in the final certificate were later amended. In October 1992, Consumers submitted to the NRC proposed changes to the Palisades security

plan necessitated by the use of the VSC-24 casks. In January 1993, the NRC met with Consumers officials to discuss the delay in adoption of the final rule. Consumers informed the NRC that if the rule were not approved by May 1993, it would be unable to maintain full capacity at Palisades and would be forced to reduce the plant's power output. The NRC director of operations raised this issue with the NRC commissioners before the final rule was approved.

In February 1993, Consumers submitted an additional set of revisions to the Palisades security plan. On April 29, 1993, Consumers submitted for approval and revision an emergency plan related to the VSC-24 casks. The NRC later determined that the emergency plan was acceptable. That finding was not subject to public comment.

On April 7, 1993, the NRC published its final rule adding the VSC-24 cask to the list of dry storage containers approved for use at any reactor site in the United States. The **42 F.3d 1507** rule became final on May 7, 1993. Along with the rule, the NRC issued a Safety Evaluation Report comparing the cask's design to regulatory requirements and a certificate of compliance. The agency also included in the Federal Register a lengthy statement providing technical and legal responses to comments on the VSC-24 cask.

Since the rule approving use of the cask became effective, Consumers has loaded two VSC-24 casks with spent fuels from the Palisades fuel pool and has placed the casks on the concrete storage pad at the Palisades site.

B.

On May 4, 1993, before the NRC rule became final, petitioners Kelley, Read, Perman and Lake Michigan Federation filed a four-count complaint in the district court against the NRC and its commissioners seeking preliminary injunctive relief. Petitioners also sought a temporary restraining order to prevent the rule from

becoming effective and to prohibit Consumers from loading spent fuel into the VSC-24 casks. Petitioners alleged that the NRC had failed to comply with the NEPA by refusing to prepare an environmental impact statement or assessment considering concerns specific to the Palisades location and that the environmental assessment relating to the adoption of the amendment to Subpart K, 10 C.F.R. § 72.214, was deficient. Consumers was granted leave to intervene without objection.

The district court dismissed the action on May 10, 1993, at which time loading of the casks had already begun, finding that jurisdiction properly resided in the court of appeals. The district court then transferred the case to this court as No. 93-1646. Petitioners subsequently filed a motion for an emergency stay with this court. We denied the motion on May 17, 1993, holding that petitioners had not satisfied the requirements for a stay. On the same day, petitioners filed an appeal from the district court's dismissal for lack of subject matter jurisdiction, which was docketed in this court as No. 93-1710.

Petitioners Kelley and Lake Michigan Federation filed a motion with the NRC on May 24, 1993, seeking a stay of the effectiveness of the rule, or in the alternative, the rescission of the VSC-24 cask rule. The NRC's executive director of operations denied the request for a stay and held the request for rescission in abeyance. On June 4, 1994, petitioners Kelley, Lake Michigan Federation and Don't Waste Michigan filed a petition for review of the final rule adding the VSC-24 cask to the list of approved storage facilities. The appeal was docketed as No. 93-3613. After respondents NRC and Consumers filed motions to dismiss the petition for review, petitioners Kelley and Lake Michigan Federation filed an amended supplemental petition for review, which was docketed as No. 93-3749. This court denied the motions to dismiss and consolidated all the actions for review.

II.

A.

Intervenor Consumers argues that petitioners lack standing to maintain their action. Specifically, Consumers asserts that petitioners Read, Perman, and Kimmelman, suing as owners of land near the Palisades plant, no longer have standing because they are parties only to the two actions originating in the district court and because those claims have become moot. According to Consumers, Petitioner Kelley, acting as attorney general for the state of Michigan, lacks standing because he is improperly pursuing this matter on behalf of Michigan residents in a type of parens patriae action that is not permitted against the federal government. Finally, Consumers argues that the two membership organizations petitioning the court, the Lake Michigan Federation and Don't Waste Michigan, lack standing because the organizations have failed to allege any concrete interests of their members that have been injured by respondents' actions.

The issue of standing is a matter of law which we review de novo. *Michigan v. United States*, 994 F.2d 1197, 1202 (6th Cir.1993). In order to determine whether petitioners have standing, we " 'accept as true all material **42 F.3d 1508** allegations of the complaint, and ... construe the complaint in favor of the complaining party.' " *Gladstone, Realtors v. Village of Bellwood*, 441 U.S. 91, 109, 99 S.Ct. 1601, 1613, 60 L.Ed.2d 66 (1979) (quoting *Warth v. Seldin*, 422 U.S. 490, 501, 95 S.Ct. 2197, 2206, 45 L.Ed.2d 343 (1975)).

[1] To establish standing, a party must demonstrate a personal stake in the outcome of the dispute. In this case, petitioners must show that they have suffered some actual or threatened injury as a result of conduct by respondents, that the injury is traceable to the challenged action and that the injury can be redressed by a decision in their favor. *Michigan v. United States*, 994 F.2d at 1203 (citing *Valley Forge Christian College v. Americans United for Separation of Church and State*, 454 U.S. 464, 472, 102 S.Ct. 752, 758, 70

L.Ed.2d 700 (1982) (citations omitted)). Moreover, the interest being asserted must be "within the zone of interests to be protected or regulated by the statute ... in question." *Association of Data Processing Serv. Orgs., Inc. v. Camp*, 397 U.S. 150, 153, 90 S.Ct. 827, 830, 25 L.Ed.2d 184 (1970). It is not necessary that every injury asserted by petitioners be sufficiently concrete to satisfy these requirements; it is enough if some of the injuries claimed are, or result in, clearly adverse effects on petitioners. *Duke Power Co. v. Carolina Envtl. Study Group, Inc.*, 438 U.S. 59, 73, 98 S.Ct. 2620, 2630, 57 L.Ed.2d 595 (1978).

[2][3] Petitioners' injury must be "distinct and palpable," *Warth v. Seldin*, 422 U.S. 490, 501, 95 S.Ct. 2197, 2206, 45 L.Ed.2d 343 (1975); *Lugo v. Miller*, 640 F.2d 823, 827 (6th Cir.1981), not merely a hypothetical or imagined detriment. *Linton v. Commissioner of Health and Env't*, 973 F.2d 1311, 1316 (6th Cir.1992). That petitioners disagree with respondents is not by itself enough to establish standing. *Linton*, 973 F.2d at 1316 (citing *Diamond v. Charles*, 476 U.S. 54, 62, 106 S.Ct. 1697, 1703, 90 L.Ed.2d 48 (1986)). Moreover, petitioners may not rely on their prior intervention before the NRC as the sole basis for claiming standing. "The mere fact that [petitioner] was permitted to intervene before the Commission does not entitle it to institute an independent suit to set aside the Commission's order in the absence of resulting actual or threatened legal injury to it." *Pittsburgh & W. Va. Ry. Co. v. United States*, 281 U.S. 479, 486, 50 S.Ct. 378, 381, 74 L.Ed. 980 (1930). *See also Center for Auto Safety v. National Highway Traffic Safety Admin.*, 793 F.2d 1322, 1329 n. 41 (D.C.Cir.1986) (finding organization's participation in agency rulemaking procedure insufficient basis on which to rest standing for an independent action); *Chemehuevi Tribe of Indians v. Federal Power Comm'n*, 489 F.2d 1207, 1242 n. 12 (D.C.Cir.1973) (reviewing standing despite participation in agency proceedings), *vacated and remanded on different grounds*, 420 U.S. 395, 95 S.Ct. 1066, 43 L.Ed.2d 279 (1975).

Consumers alleges that petitioners Read, Perman and Kimmelman lack standing because they are parties only to the actions relating to the district court proceedings, No. 93-1710 and No. 93-1646. Consumers asserts that the appeal from the district court decision, No. 93-1710, has been abandoned and that, in addition, both Nos. 93-1646 and 93-1710 have been rendered moot by the passage of the NRC's final rule. Because the relief initially sought was an order enjoining the NRC from taking steps to allow loading of the VSC-24 casks at Palisades and because the rule now allows Consumers to begin loading without any further action by the NRC, Consumers alleges that the basis for petitioners' claims has disappeared. We disagree with Consumers and conclude that petitioners Read, Perman, and Kimmelman have standing.

Consumers bases its conclusion that petitioners have abandoned their appeal of the district court's decision on the statement in petitioners' brief that "even though the District Court erred, this Court need not reverse the District Court to find for Petitioners on their NEPA claims because the merits of all of Petitioners' NEPA claims are now before this Court...." Petitioners' Brief at 40 n. 9. This language, properly interpreted, does not evidence petitioners' abandonment of the claim but indicates that petitioners believe they have alternate grounds on which this court could rule. In addition, we have previously concluded that "all parties are **42 F.3d 1509** now before this court." 8/10/93 Order of this Court.[2/]

[4] Having concluded that petitioners have not abandoned their claims under No. 93-1710, we must examine whether, as argued by Consumers, the two actions relating to the district court proceedings have been rendered moot by the passage of the NRC's final rule. The NRC rule has become final but only after the NRC took action to promulgate the rule, action that petitioners allege

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[2/] The district court correctly ruled that it was without subject matter jurisdiction to consider plaintiffs' claims in No. 93-1646, and the case was properly transferred to this court. *See Michigan v. United States*, 994 F.2d 1197 (6th Cir.1993).

violates their procedural rights. The mere fact that the rule has gone into effect does not imply that petitioners' request for redress is a nullity. This is so because passage of the final rule does not eliminate the issue of whether respondent improperly took steps to implement that rule. *See, e.g., Porter v. Lee*, 328 U.S. 246, 251-52, 66 S.Ct. 1096, 1099-1100, 90 L.Ed. 1199 (1946) (finding action to restrain tenant's eviction not moot by reason of tenant's vacation of the premises); *Symington Wayne Corp. v. Dresser Indus., Inc.*, 383 F.2d 840, 842 (2d Cir.1967) (holding that appeal from preliminary injunction against tender offer was not mooted by expiration of the offer). Furthermore, to find these actions moot as a result of the enactment of the NRC rule would require dismissal of petitioners' claims on the basis of inaction by respondent. By simply allowing the rule to become final without responding to petitioners, respondents would have been allowed to circumvent the procedural rules with which petitioners argue they must comply.

Assuming, as we must, that petitioners are asserting viable claims, the likely remedy would include exactly the relief petitioners seek. The language of the complaint indicates that while petitioners did originally seek an injunction or other restraint on further action allowing loading or storage of waste in the VSC-24 casks at Palisades, petitioners also sought "such other relief as this court deems proper." J.A. 48, 50. Petitioners asked the court to stop these actions "until Defendants fully explore all of the environmental impacts," J.A. 51, and "until Defendants have prepared an adequate EA." J.A. 53. Phrased this way, petitioners' claims might be conceived as continuing harms, against which action may still be taken to prohibit use of the VSC-24 cask at Palisades. It is not absolutely clear that " 'there is no reasonable expectation that the wrong will be repeated.' " *United States v. W.T. Grant Co.*, 345 U.S. 629, 633, 73 S.Ct. 894, 897, 97 L.Ed. 1303 (1953). *See also Natural Resources Defense Council, Inc. v. Morton*, 337 F.Supp. 170, 173 (D.D.C.1972) (finding that burden of showing mootness is a heavy one). Had the NRC published a

new rule using the procedures petitioners assert are proper, the promulgation of that rule might have rendered this action moot. However, in the absence of such action, we cannot conclude that petitioners' claims are moot, and we hold that the cases numbered 93-1646 and 93-1710 involve a live controversy.

[5] Petitioners Read, Perman, and Kimmelman have alleged sufficient injury to establish standing. Each owns land in close proximity to the Palisades plant and the proposed site for spent fuel storage. The petitioners have asserted a personal stake in the outcome of the litigation by virtue of their ownership and use of their property for residential and leisure pursuits. Not only do petitioners assert harm to their aesthetic interests and their physical health, but each also asserts that the value of his or her property will be diminished by the storage of nuclear waste in the VSC-24 casks at Palisades. Thus, petitioners' claims are sufficient to establish standing. *See Lujan v. Defenders of Wildlife*, --- U.S. ----, ----, 112 S.Ct. 2130, 2142, 119 L.Ed.2d 351 (1992) (noting that the claim at issue was "not a case where plaintiffs are seeking to enforce a procedural requirement the disregard of which could impair a separate concrete interest of theirs (e.g., ... the procedural requirement for an environmental impact statement before a federal facility is constructed next door to them)"). Petitioners are clearly asserting a threatened injury. The injury can be fairly traced to respondents' actions since **42 F.3d 1510** petitioners allege that it is the storage of spent nuclear fuels in the VSC-24 cask that has the potential to interrupt enjoyment of their lakefront property and to diminish its value. Finally, a decision in their favor could redress the threatened harm. While the NRC rule being challenged has become effective, resolution of this action in petitioners' favor could reverse that decision, at least until proper procedures are followed.

It is not necessary for this court to determine that each petitioner in the four actions consolidated in this appeal has standing; it is enough that one petitioner may properly assert his claim. Because petitioners Read, Perman, and Kimmelman have

standing, it is not necessary for us to address the standing of the remaining petitioners, Attorney General Kelley, Don't Waste Michigan and Lake Michigan Federation. *See Watt v. Energy Action Educ. Found.*, 454 U.S. 151, 160, 102 S.Ct. 205, 212, 70 L.Ed.2d 309 (1981); *Doe v. Bolton*, 410 U.S. 179, 189, 93 S.Ct. 739, 746, 35 L.Ed.2d 201 (1973).

[6] Petitioners argue that the NRC violated § 189(a) of the Atomic Energy Act, 42 U.S.C. § 2239(a)(1)(A), by denying their request for an adjudicatory hearing concerning the storage of nuclear waste in VSC-24 casks at Palisades. Specifically, petitioners assert that NRC's addition of the VSC-24 storage cask to the list of approved storage systems at 10 C.F.R. § 72 (Subpart K), via generic rulemaking, constituted an attempt "to shut Petitioners out of any meaningful public participation on the question of whether the NRC should allow Consumers to store its waste outdoors at Palisades in a never-before-used or fully tested concrete cask within yards of the Lake Michigan shoreline." Appellants' Brief at 21. Petitioners further assert that they are only seeking an opportunity for a hearing in order to dispute issues that are site-specific in relation to the use of the VSC-24 cask at Palisades. Appellants' Brief at 37-38.

Section 189(a) of the Atomic Energy Act of 1954 states in relevant part:

> In any proceeding under this chapter, for the granting, suspending, revoking, or amending of any license or construction permit, or application to transfer control, and in any proceeding for the issuance or modification of rules and regulations dealing with the activities of licensees, ... the [Nuclear Regulatory] Commission shall grant a hearing upon the request of any person whose interest may be affected by the proceeding, and shall admit any such person as a party to such proceeding.

42 U.S.C. § 2239(a)(1)(A). Furthermore, § 10154 of the Nuclear Waste Policy Act of 1982 ("NWPA"), provides in relevant part:

> (a) Oral argument. In any Commission hearing under section 189 of the Atomic Energy Act of 1954 (42 U.S.C. 2239) on application for a license, or for an amendment to an existing license, filed after January 7, 1983, to expand the spent nuclear fuel storage capacity at the site of a civilian nuclear power reactor, through the use of ... dry storage capacity, or by other means, the Commission shall, at the request of any party, provide an opportunity for oral argument with respect to any matter which the Commission determines to be in controversy among the parties....
>
> (b) Adjudicatory hearing
>
> (1) At the conclusion of any oral argument under subsection (a) of the section, the Commission shall designate any disputed question of fact, together with any remaining questions of law, for resolution in an adjudicatory hearing only if it determines that--
>
> (A) there is a genuine and substantial dispute of fact which can only be resolved with sufficient accuracy by the introduction of evidence in an adjudicatory hearing; and
>
> (B) the decision of the Commission is likely to depend in whole or in part on the resolution of such dispute.
>
> * * * * * *
>
> (c) Judicial review
>
> No court shall hold unlawful or set aside a decision of the Commission in any proceeding described in subsection (a) of this section because of a failure by the Commission **42 F.3d 1511** to use a particular procedure pursuant to this section unless--

> (1) an objection to the procedure used was presented to the Commission in a timely fashion or there are extraordinary circumstances that excuse the failure to present a timely objection;
>
> and (2) the court finds that such failure has precluded a fair consideration and informed resolution of a significant issue of the proceeding taken as a whole.

42 U.S.C. § 10154.

In order to prevail on a claim that the NRC is bound to conduct its proceedings in a particular manner, a petitioner "must point to a statute specifically mandating that procedure, for 'absent constitutional constraints or extremely compelling circumstances' courts are never free to impose on the NRC (or any other agency) a procedural requirement not provided for by Congress." *Union of Concerned Scientists v. United States Nuclear Regulatory Comm'n*, 920 F.2d 50, 53 (D.C.Cir.1990) (quoting Vermont *Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*, 435 U.S. 519, 543, 98 S.Ct. 1197, 1211, 55 L.Ed.2d 460 (1978)). " '[I]f the statute is clear and unambiguous, "that is the end of the matter, for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." ' " *Mobil Oil Exploration & Producing Southeast, Inc. v. United Distribution Cos.*, 498 U.S. 211, 223, 111 S.Ct. 615, 623, 112 L.Ed.2d 636 (1991) (quoting *Sullivan v. Stroop*, 496 U.S. 478, 482, 110 S.Ct. 2499, 2502, 110 L.Ed.2d 438 (1990)).

Although 42 U.S.C. § 2239(a)(1)(A) provides that the Commission shall grant a hearing, "the Act itself nowhere describes the content of a hearing or prescribes the manner in which this 'hearing' is to be run." *Union of Concerned Scientists*, 920 F.2d at 53. Likewise, the NWPA, 42 U.S.C. § 10154, provides for oral argument, but it does not describe the content of oral argument or prescribe how oral argument is to be conducted. *See also Nuclear Information Resource Serv. v. Nuclear Regulatory Comm'n*, 969

F.2d 1169, 1173 (D.C.Cir.1992) ("While [42 U.S.C. § 2239(a)(1)(A)] plainly requires a 'hearing upon request' ... it provides no unambiguous instruction as to how the 'hearing' is to be held; nor does it speak in any direct fashion to the question of whether the [NRC] must rehear issues already resolved...."). " 'The Court has recognized that even where an agency's enabling statute expressly requires it to hold a hearing, the agency may rely on its rulemaking authority to determine issues that do not require case-by-case consideration'.... '[A] contrary holding would require the agency continually to relitigate issues that may be established fairly and efficiently in a single rulemaking proceeding.' " *Mobil Oil Exploration & Producing Southeast, Inc. v. United Distribution Cos.*, 498 U.S. at 228, 111 S.Ct. at 626 (quoting *Heckler v. Campbell*, 461 U.S. 458, 467, 103 S.Ct. 1952, 1957, 76 L.Ed.2d 66 (1983)).

Furthermore, the courts are "obliged to defer to the operating procedures employed by an agency when the governing statute requires only that a 'hearing' be held." *Union of Concerned Scientists*, 920 F.2d at 54. "In fact, the D.C. Circuit has noted that the Atomic Energy Act of 1954 creates 'a regulatory scheme which is virtually unique in the degree to which broad responsibility is reposed in the administrative agency, free of close prescription in its charter as to how it shall proceed in achieving the statutory objectives.' " *Ohio ex rel. Celebrezze v. Nuclear Regulatory Comm'n*, 868 F.2d 810, 813 (6th Cir.1989) (quoting *Siegel v. Atomic Energy Comm'n*, 400 F.2d 778, 783 (D.C.Cir.1968)). As the Supreme Court has stated, "the [Nuclear Regulatory] Commission is making predictions ... at the frontiers of science. When examining this kind of scientific determination, as opposed to simple findings of fact, a reviewing court must generally be at its most deferential." *Baltimore Gas & Elec. Co. v. Natural Resources Defense Council, Inc.*, 462 U.S. 87, 103, 103 S.Ct. 2246, 2255, 76 L.Ed.2d 437 (1983) (citations omitted). After all, "[j]udges are neither scientists nor technicians." *Lower Alloways*

Creek Township v. Public Serv. Elec. & Gas Co., 687 F.2d 732, 743 (3d Cir.1982). Moreover, such deference is especially applicable when the NRC is structuring its own rules of procedure and methods of inquiry. *Vermont Yankee*, **42 F.3d 1512** 435 U.S. at 543, 98 S.Ct. at 1211. *See also Rockford League of Women Voters v. United States Nuclear Regulatory Comm'n*, 679 F.2d 1218, 1223 (7th Cir.1982) ("Our job is to assure that the Commission complies with the specific statutes and regulations applicable to its regulatory activities.... Beyond that our power to review an agency's decision not to initiate a proceeding is extremely limited. We would exercise it only if we were strongly convinced that the Commission was inexcusably defaulting on its fundamental responsibility to protect the public safety from nuclear accidents."). Accordingly, a decision of the NRC "may not be overturned unless it is found to be 'arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law.' " *In re Three Mile Island Alert, Inc.*, 771 F.2d 720, 727 (3d Cir.1985) (quoting 5 U.S.C. § 706(2)(A) (1988)), *cert. denied*, 475 U.S. 1082, 106 S.Ct. 1460, 89 L.Ed.2d 717 (1986).

Furthermore, the National Environmental Policy Act of 1969 ("NEPA"), 42 U.S.C. ss 4321 to 4361, also impacts upon the NRC's decision in this case. NEPA requires that federal agencies prepare a "detailed statement," known as an environmental impact statement ("EIS"), for every major federal action "significantly affecting the quality of the human environment." 42 U.S.C. § 4332(2)(C). The EIS must address "any adverse environmental effects" of the projects and "alternatives to the proposed action." Id. However, the duties which NEPA imposes upon federal agencies are "essentially procedural." *Vermont Yankee*, 435 U.S. at 558, 98 S.Ct. at 1219.

"Although NEPA requires the [NRC] to undertake 'careful consideration,' of environmental consequences, ... [the NRC] may issue a rulemaking to address and evaluate environmental impacts that are 'generic;' " namely, neither plant-specific nor site-specific.

Limerick Ecology Action, Inc. v. United States Nuclear Regulatory Comm'n, 869 F.2d 719, 723 (3d Cir.1989) (quoting *Baltimore Gas*, 462 U.S. at 98, 103 S.Ct. at 2253). Under NEPA, " '[t]he role of the courts ... is simply to ensure that the agency has adequately considered and disclosed the environmental impact of its actions and that its decision is not arbitrary and capricious.' " Id. at 723 (quoting *Baltimore Gas*, 462 U.S. at 97-98, 103 S.Ct. at 2252).

"NEPA does not require agencies to adopt any particular internal decisionmaking structure." *Baltimore Gas*, 462 U.S. at 100, 103 S.Ct. at 2254. Furthermore, "[w]hile NEPA clearly mandates that an agency fully consider environmental issues, it does not itself provide for a hearing on those issues." *Union of Concerned Scientists*, 920 F.2d at 56. Thus, "[t]he generic method chosen by the [NRC] is clearly an appropriate method of conducting the hard look required by NEPA." *Baltimore Gas*, 462 U.S. at 101, 103 S.Ct. at 2254.

In this case, the NRC's denial of petitioners' request for an adjudicatory hearing concerning the storage of spent nuclear fuel in VSC-24 casks at Palisades was neither arbitrary, capricious, an abuse of discretion, nor otherwise not in accordance with the law. In the rulemaking at issue here, the NRC amended 10 C.F.R. § 72.214, adding the VSC-24 cask to the list of spent fuel storage which nuclear power reactor licensees may use pursuant to the provisions of their general license.

The public had an extensive opportunity to comment on the proposed amendment to 10 C.F.R. § 72.214 and the suitability of the VSC-24 cask for the dry storage of spent nuclear fuels. Further, this opportunity for public comment included an extended period of public comment on the proposed addition of the VSC-24 cask to the list of approved dry storage casks in 10 C.F.R. § 72.214. After the NRC published its notice of intent to add the VSC-24 cask to the list of approved casks, the NRC provided a 75-day period for public comment, and the initial period of public comment was followed by an additional period for public comment

after new information concerning the VSC-24 casks was made available to the public. NRC's addition of the VSC-24 cask to the list of approved dry storage containers did not become final until May 7, 1993.

Moreover, during the period of public comment, the NRC conducted a three-hour meeting at which Michigan citizens were permitted to make oral statements about the VSC-24 **42 F.3d 1513** casks. The oral statements made by Michigan residents did include comments about the site-specific use of the VSC-24 casks at Palisades and, most particularly, comments about the effects of the severe freeze-thaw cycle in Michigan on the concrete containers for the casks as well as comments about the fact that the concrete pad for the casks at Palisades was to be built on or near dunes on the Lake Michigan shoreline.

Thus, petitioners' assertion that the NRC attempted to shut them out of meaningful participation on the question of the use of the VSC-24 casks is meritless. As earlier stated, the NRC provided a period of public comment on the use of the VSC-24 casks, and it also held a three-hour "hearing" at which Michigan citizens were able to raise their concerns about the use of the VSC-24 casks at Palisades. In this case, what petitioners are really seeking is to have this court use its power of judicial review of NRC actions to micromanage NRC decisionmaking and, in particular, dictate to the agency the procedure which it must use in approving designs for containers for the dry storage of spent nuclear fuel.

However, as noted above, NRC decisionmaking, and in particular the procedure used by the agency in the course of its decisionmaking, is entitled to substantial deference by this court. Although the NRC denied petitioners' request for an adjudicatory hearing concerning the use of the VSC-24 casks at Palisades, the NRC did hold a "hearing" at which Michigan citizens were able to comment. The applicable statute, 42 U.S.C. § 2239(a)(1)(A), provides for a "hearing," but does not provide for any particular format for this hearing. Further, nothing in the applicable statutes

or the relevant precedents compels the NRC to hold a formal adjudicatory hearing.

Furthermore, the approval of the design of containers for the dry storage of spent nuclear fuel, such as the VSC-24 cask, is exactly the type of NRC decision which may be the subject of generic rulemaking. The NWPA states in relevant part:

> The Secretary [of Energy] shall establish a demonstration program, in cooperation with the private sector, for the dry storage of spent nuclear fuel at civilian nuclear power reactor sites, with the objective of establishing one or more technologies that the [Nuclear Regulatory] Commission may, *by rule*, approve for use at the sites of civilian nuclear power reactors without, to the maximum extent practicable, the need for additional site-specific approvals by the Commission.

42 U.S.C. § 10198 (emphasis added). In this instance, the design of technology for the dry storage of spent nuclear fuels, such as the VSC-24 cask, is the type of decision which does not require case-by-case consideration. Indeed, to require the NRC to evaluate the alternatives for the dry storage of spent nuclear fuel on a case-by-case basis "would require the agency continually to relitigate issues that may be established fairly and efficiently in a single rulemaking proceeding." *Mobil Oil*, 498 U.S. at 228, 111 S.Ct. at 626.

More importantly, the NRC's certificate of compliance for the VSC-24 casks, like the certificates of compliance for the other dry storage technologies listed in 10 C.F.R. § 72.214, contains a lengthy list of conditions of system use for operation of the VSC-24. J.A. 702-39. This extensive list of conditions for use of the VSC-24 cask will virtually eliminate the need for site-specific consideration concerning the use of the VSC-24 cask, since the various licensees of civilian nuclear power generating facilities will be able to determine from the conditions of system use for the VSC-24 cask whether it is possible to use the cask at the site of

their nuclear power generating facility. Furthermore, in finding that the approval of designs for casks for the dry storage of spent nuclear fuel was particularly amenable to generic rulemaking, the NRC stated:

> An important consideration is that free-standing casks, being very strong and massive structures, are independent of the effects of site-specific natural phenomena.... Importantly, site-specific approvals would not be required by the Commission, provided conditions in subpart K are met.

55 Fed.Reg. 29,186; J.A. 454.

[7] Finally, petitioners also attach significance to the fact that the NRC granted **42 F.3d 1514** Pacific Sierra, the vendor of the VSC-24 cask, an exemption that permitted the fabrication of a limited number of casks for Consumers prior to the issuance of the Certificate of Compliance for the VSC-24 cask. However, the mere grant of an exemption to begin fabricating the casks does not trigger a right to an adjudicatory hearing on the part of petitioners. Most importantly, although the NRC granted a limited exemption to Pacific Sierra for the fabrication of the VSC-24 casks for Consumers, Consumers did not begin to load or use the VSC-24 casks until after the Certificate of Compliance for the VSC-24 cask was issued by the NRC on May 7, 1993. Further, petitioners have pointed to no facts which would indicate that the VSC-24 casks currently in use at Palisades do not comply with the conditions for use set forth in the Certificate of Compliance for the VSC-24 cask.

C.

Petitioners argue that respondents made several key site-specific decisions regarding use of the VSC-24 cask at Palisades without granting the public the right to express concerns about the issues involved. Even if the NRC's promulgation of its final rule amounts to a generic rulemaking, petitioners contend that the agency cannot use the shield of such a rulemaking as protection from the requirement that it grant hearing rights with regard to site-specific

determinations. Petitioners claim several instances of site-specific decisionmaking by the NRC, including the agency's grant of an exemption to Pacific Sierra to allow construction of the VSC-24 before the certificate of compliance was issued and the NRC's approval of amendments to Palisades' security and emergency plans. We have already upheld the NRC's promulgation, through a generic rulemaking proceeding, of the final rule adding the VSC-24 cask to the list of approved storage containers.

[8] We now turn to the question of whether respondents made decisions narrowly tailored to apply only to Palisades, decisions that amount to site-specific determinations. Petitioners claim that the rulemaking procedure at issue was, in fact, a "joint effort by the NRC, the utility [Consumers], and the cask manufacturer to expedite the use of the VSC-24 cask at Palisades." Petitioners' Brief at 26. Petitioners object to this collaboration and assert that, pursuant to 42 U.S.C.A. § 2239 (AEA § 189(a)), "[p]ublic participation is automatic with respect to all [NRC] actions that are potentially harmful to the public health and welfare." *Bellotti v. United States Nuclear Regulatory Comm'n*, 725 F.2d 1380, 1383 (D.C.Cir.1983). However, the authority on which petitioners rely to establish this point does not mandate the sweeping hearing rights petitioners are seeking as a result of the decisions allegedly made by the NRC. Petitioners are correct in asserting that § 189(a) of the AEA provides that

> [i]n any proceeding under this chapter, for the granting, suspending, revoking, or amending of any license or construction permit ... the Commission shall grant a hearing upon the request of any person whose interest may be affected by the proceeding....

However, the *Bellotti* court made clear that not every proposed action falls under this provision; the right to automatic participation applies only when the agency acts in a matter provided for in § 189(a), which includes matters generally concerned with the licensing process. Moreover, the Commission has the authority and

discretion to control § 189(a) proceedings in order to avoid "turning focussed regulatory proceedings into amorphous public extravaganzas." *Bellotti*, 725 F.2d at 1382. If the Commission did not have such authority, and public participation were automatically required for any agency action, the public would be entitled to an unrestrained platform that would disable the Commission and effectively prevent it from taking any action. *Bellotti*, 725 F.2d at 1382. *See also Union of Concerned Scientists v. United States Nuclear Regulatory Comm'n*, 920 F.2d 50, 53 (D.C.Cir.1990) (noting that courts may not impose on agencies procedural requirements not permitted by Congress) (citing *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council*, 435 U.S. 519, 543, 98 S.Ct. 1197, 1211, 55 L.Ed.2d 460 (1978)). Nonetheless, **42 F.3d 1515** even though petitioners are not automatically entitled to a hearing pursuant to § 189(a), they are not without recourse. If petitioners wish to litigate these issues, which are beyond the scope of required proceedings, they may file a petition with the Commission pursuant to 10 C.F.R. § 2.206. The Commission may not deny such a petition arbitrarily. *Bellotti*, 725 F.2d at 1383.

In *Union of Concerned Scientists*, the Court of Appeals for the District of Columbia limited the NRC's power to prevent parties from raising issues in § 189(a) hearings but only to the extent that parties may not be denied a hearing on an issue the Commission agrees is material to its licensing decision. *Union of Concerned Scientists*, 920 F.2d at 55. There is no licensing decision being made here. The NRC's actions, while they may have benefitted Consumers and Palisades, were not directed toward licensing the facility. The decisions to which petitioners refer as site-specific do not grant Consumers the right to operate Palisades in any greater capacity than the plant had previously been allowed to operate, and the NRC did not exempt Consumers from operating under any specific safety requirements or change the rules applicable to Consumers to such an extent that it no longer followed otherwise

applicable NRC rules and regulations. *See Massachusetts v. United States Nuclear Regulatory Comm'n*, 878 F.2d 1516, 1520-21 (1st Cir.1989). Petitioners cannot support a claim that the NRC has been hesitant to require licensing amendments when circumstances indicated they were necessary. In two nuclear plants in which equipment was inadequate to handle the proposed cask system, the NRC amended the operators' licenses in order to require different equipment. *See, e.g.*, 56 Fed.Reg. 60,118 (Prairie Island Nuclear Generating Plant); 56 Fed.Reg. 37,577 (Calvert Cliffs Nuclear Power Plant).

[9] Under the present regulatory scheme, licensees are required to review their operations and facilities and determine whether technical changes are required or unreviewed safety questions are present that would require an amendment to the reactor's operating license. See 54 Fed.Reg. 19,379 and 19,381; 55 Fed.Reg. 29,181 and 29,183; 58 Fed.Reg. 17,948 and 17,951. Petitioners argue that the NRC's use of this approach belies the fact that site-specific decisions are being made and comes perilously close to self-regulation. However, this approach is consistent with the NRC's historical method of regulation, which has long allowed licensees to make initial determinations about changes to their facilities and has enabled the agency to retain its enforcement power. 10 C.F.R. § 50.59. The record does not support petitioners' suggestion that the NRC blindly listens to the "self serving" assertions of licensees. NRC inspection activity "provides a feedback mechanism and an independent verification of the effectiveness of the licensee's implementation of its programs...." 56 Fed.Reg. 64,943, 64,951-52.[3/]

[3/] Petitioners' arguments appear to claim that portions of the NRC's 1990 rulemaking are invalid. We cannot reach this issue, however, because we find that petitioners should have asserted such a claim within the 60-day period allowed by the Hobbs Act. 28 U.S.C. s 2344.

(continued...)

42 F.3d 1516 [10] Petitioners assert that the references in the NRC's final rule and comments to Consumers' (1) analysis of

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3/ (...continued)

Petitioners argue that this claim is only now ripe for review because the new NRC rule became a concrete action as applied to them in 1993. *Reno v. Catholic Social Servs., Inc.*, --- U.S. ----, ---- - ----, 113 S.Ct. 2485, 2488-89, 125 L.Ed.2d 38 (1993); *Lujan v. National Wildlife Fed'n*, 497 U.S. 871, 891, 110 S.Ct. 3177, 3190, 111 L.Ed.2d 695 (1990). These cases do not, as petitioners assert, establish that petitioners' claims have become viable only since the NRC's 1993 acts. In *Lujan*, the Supreme Court found that in the absence of a specific authorization in the "substantive statute," a person claiming a right to sue under the general provisions of the Administrative Procedure Act must establish that he is adversely affected or aggrieved by agency action. *Lujan*, 497 U.S. at 891, 110 S.Ct. at 3190. In this case, a specific statute does articulate the period during which action can be taken. Specific statutory authorization, not the general provisions of s 702, prevails. *Reno* sets forth the requirement that some concrete action establish a petitioner's claim in a regulatory proceeding. *Reno*, --- U.S. ----, ----, 113 S.Ct. 2485, 2496, 125 L.Ed.2d 38 (1993). Even in that case, however, the Court noted that "[i]n some cases, the promulgation of a regulation will itself affect parties concretely enough to satisfy [the] requirement" of ripeness. *Reno*, --- U.S. at ----, 113 S.Ct. at 2495 (citing *Abbott Labs. v. Gardner*, 387 U.S. 136, 87 S.Ct. 1507, 18 L.Ed.2d 681 (1967)). In this case, the NRC's 1990 rule had an immediate impact. After promulgation of the rule, the very procedures about which petitioners now complain were in place, and any civilian reactor in the nation, including Palisades, was free to use the approved storage systems.

In addition, petitioners cite *Edison Elec. Institute v. EPA* to establish that "'the period for seeking judicial review may be made to run anew when the agency in question by some new promulgation creates the opportunity for renewed comment and objection.'" *Edison*, 996 F.2d 326, 331 (D.C.Cir.1993) (quoting *Ohio v. EPA*, 838 F.2d 1325, 1328 (D.C.Cir.1988)). See also *Public Citizen v. Nuclear Regulatory Comm'n*, 901 F.2d 147, 151 (D.C.Cir.) (holding that agency's decision to reconsider a rule three years after it was first promulgated prompted a new period for judicial review), *cert. denied*, 498 U.S. 992, 111 S.Ct. 536, 112 L.Ed.2d 546 (1990). These cases, however, have no bearing on our consideration of petitioners' claim. *Edison* and *Public Citizen* involved reconsideration of agency regulations and agency attempts to set forth alternative approaches to prior established regulations. The so-called reopener doctrine applied in these cases is not required here. The NRC has not reconsidered the propriety of its grant of a general license. Moreover, it is not making drastic changes that have the effect of restructuring its earlier rules. It is merely adding a new form of storage cask to its list of approved systems.

load-handling activities, (2) evaluations of whether the storage pads were designed to adequately support the weight of the casks, and (3) determinations of whether the reactor site's characteristics would permit the use of the casks as designed were improperly accepted by respondents without affording members of the public the chance to participate in the controversy. This is not correct. The evaluations submitted by Consumers were merely the manner by which the utility sought to comply with NRC regulations and specifications. The public had an opportunity to be heard when the agency first considered the new rule and began a public comment period. In fact, the original comment period was extended after the release of new information in the public domain. Members of the public with concerns about the new casks were aware of the factors the agency would be taking into consideration in issuing the certificate of compliance and had a chance to voice their concerns. Their opportunity to comment was not denied. Furthermore, petitioners' reliance on *United States Lines, Inc. v. Federal Maritime Comm'n*, 584 F.2d 519, 540 (D.C.Cir.1978), and *National Wildlife Fed'n v. Marsh*, 568 F.Supp. 985, 993 (D.D.C.1983), is misplaced. Those cases deal with instances in which the agency failed to disclose the rationale behind its actions prior to the conclusion of the public comment period. Here petitioners knew of the agency's concerns and had an opportunity to express their own.

Petitioners attempt to argue that if the NRC has merely accepted the licensee's technical and safety reviews without making site-specific determinations, its actions amount to active avoidance of public participation. If this is the case, petitioners assert that the NRC has shirked its responsibility under the AEA to assure that no actions are taken that are detrimental to the health and safety of the public, 42 U.S.C. § 2133(d), and has impermissibly delegated its regulatory power to private individuals. Petitioners fail to note, however, that the evaluations submitted by Consumers were in response to the conditions on use specified in the certificate of compliance issued by the NRC. In addition, the AEA endows the

NRC with significant discretion to determine the information that is necessary to support the factual findings of the agency during the licensing process. *See, e.g.*, 42 U.S.C. § 2232(a). Finally, no grounds exist for petitioners' claim that certain unreviewed issues persisted as to which members of the public were denied the right to be heard. The NRC had clearly reviewed the issues. As an example, respondents point to the response by the NRC to one commenter's claim that the issue of loading procedures constituted an unreviewed safety issue. In its answer to the commenter, the agency detailed the procedures required in the certificate of compliance and explained the review conducted by Consumers. Contrary to petitioners' suggestion, this case does not present " 'a situation ... where the agency has "consciously and expressly adopted a general policy" [of non-enforcement] that is so extreme as to amount to an abdication of its statutory responsibilities.' " *Safe Energy Coalition v. United States Nuclear Regulatory Comm'n*, 866 F.2d 1473, 1477 (D.C.Cir.1989) (quoting *Heckler v. Chaney*, 470 U.S. 821, 833 n. 4, 105 S.Ct. 1649, 1656 n. 4, 84 L.Ed.2d 714 (1985)).

[11] To support their theory that respondents have worked together to make site-specific **42 F.3d 1517** determinations cloaked in the terms of a generic rulemaking, petitioners rely on the NRC's grant of permission to Pacific Sierra to allow construction of a limited number of the VSC-24 casks to be used at Palisades prior to the issuance of the certificate of compliance, which evades the requirements of Subpart L. 10 C.F.R. § 72.234(c). Petitioners argue that this exemption was granted only in response to the agency's recognition that the original certification schedule could not be met and that it indicated that the NRC's push to promulgate the new rule was a result of needs specific to Palisades. Respondents correctly point out, however, that the exemption notice was published in the Federal Register, not issued in secret. 56 Fed.Reg. 41,870. In addition, the exemption allowed the construction, not the loading, of the casks prior to the issuance of the certificate of compliance. The NRC's action was consistent

with the Congressional intent evidenced in the NWPA, which grew out of concern that civilian reactors were running out of storage space for their radioactive wastes. The NRC's decision was not one made to specifically benefit Palisades but one intended to allow a utility, which happened to be Consumers, to be prepared to use a new technology to meet critical storage needs in the event of formal adoption of the amendment to 10 C.F.R. § 72. Petitioners have failed to demonstrate that had another utility been the first in line to use the casks, the NRC would not have made the same decision.[4] Moreover, we note that the grant of an exemption from a generic requirement does not constitute an amendment to the reactor's license that would trigger hearing rights. *Massachusetts v. United States Nuclear Regulatory Comm'n*, 878 F.2d 1516, 1520-21 (1st Cir.1989). *See also Duke Power Co. v. Nuclear Regulatory Comm'n*, 770 F.2d 386, 389 (4th Cir.1985) (noting that the parties had agreed that no amendment was involved in the exemption decision).

[12] Petitioners also point to the NRC's approval of revised security and emergency plans for Palisades as evidence that site-specific decisions were made. Consumers first submitted

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[4] Petitioners point to the NRC's language in the notice of exemption as evidence of the specificity of the NRC's decision. That notice provided:

> The alternative would ... delay the availability of these casks to Consumers Power Company and cause the Palisades plant to operate without full core discharge capability at the start of the next fuel operating cycle.... Lack of full core discharge would have adverse consequences on the licensee's operating schedule, should such a need arise.

56 Fed.Reg. 41,870. This language does not establish petitioners' claim. The NRC was clearly aware of the pressing nature of Consumers' need for additional storage facilities. This language, by itself, however, does not demonstrate any findings with regard to the Palisades plant or its technical operations that might have affected the NRC decision. Any other reactor might have been experiencing the same urgent needs that Palisades faced and the name of that reactor could be substituted on the NRC's notice without changing the meaning of the language. The only site-specific aspect involved is that Palisades happened to need the casks sooner than any other reactor.

revisions to its security plan in October 1992, indicating to the NRC that the changes were necessitated by modification of the plant area for construction of an independent spent fuel storage installation. Changes to the emergency plan were submitted in April 1993. These changes, Consumers claimed, were required to increase the plant's ability to detect accidents with the casks and to plan the actions to be taken in response to such accidents. The NRC approved these revisions on May 10, 1993, finding that the revisions would not degrade the effectiveness of the plant's emergency planning. Petitioners claim that this decision was site-specific to Palisades. The NRC had already addressed this issue, however, in its comments accompanying the final rule. "[T]hese requirements for license reviews do not constitute requirements for Commission approval prior to cask use; that is, no Commission findings with respect to these reviews are needed prior to use of the casks." 55 Fed.Reg. 29,181, 29,183. Without an amendment to the operating license, revisions made merely to increase the safety of the reactor do not require public participation. *Bellotti*, 725 F.2d at 1383.

Finally, petitioners support their arguments by analogy to the NRC's scheme regarding issuance of construction permits and operating licenses. Pursuant to those regulations, the NRC certifies standard designs **42 F.3d 1518** for reactors through a rulemaking procedure. 10 C.F.R. § 52. The NRC does not hold new hearings on the precertified designs when a utility seeks to invoke a plan but does hold hearings and make findings on the linkage between the design and site-specific design elements. *Nuclear Information Resource Serv. v. United States Nuclear Regulatory Comm'n*, 969 F.2d 1169, 1171 (D.C.Cir.1992) (*en banc*). This scheme is entirely different from the approval process to which petitioners object. In this case, the NRC is not permitting construction of new facilities but is merely expanding the options for disposal of spent nuclear fuels. The 1990 rulemaking emphasized that the requirements for use of the approved storage systems would make them safe for all sites in the United States, without regard to

particular local features. Moreover, certification of designs is not identical to the grant of a general license. Certification is a narrower procedure that approves designs in theory while the grant of a license is a broader form of permission. Thus, the analogy fails to support petitioners' contentions.

D.

[13] Petitioners argue that the NRC violated its obligations under NEPA by failing to conduct a site-specific environmental analysis concerning the use and operation of the VSC-24 casks at Palisades. Petitioners admit that "the NRC may rely on a generic environmental assessment regarding truly generic issues posed by the VSC-24 casks." Appellants' Brief at 42-43. However, petitioners assert that since "use of the VSC-24 cask involves the potential for a 'site-specific' impact different from those analyzed generically, a site-specific analysis is required as a matter of law and logic." Appellants' Brief at 43. Further, petitioners assert that "the NRC also failed to consider a reasonable range of alternatives to the storage of waste at Palisades." Appellants' Brief at 44.

As part of the final rule adding the VSC-24 cask to the list of approved casks in 10 C.F.R. § 72.214, the NRC stated that under the NEPA, "the Commission has determined that this rule is not a major Federal action significantly affecting the quality of the human environment and, therefore, an environmental impact statement is not required." J.A. 321. Thus, the NRC prepared an environmental assessment ("EA") for 10 C.F.R. Part 72 rather than an EIS. As part of its EA, the NRC stated:

> The Staff's evaluation has led to the conclusion that the proposed revisions to 10 C.F.R. Part 72, if promulgated, would not result in any activity that significantly affects the quality of the human environment. Promulgation of these revisions is not a major federal action significantly affecting the quality of the human environment within the meaning of NEPA.

J.A. 342. Further, in the EA the NRC also stated:

> Incremental impacts caused by the operation of dry cask storage of spent fuel under a general license are not considered significant. No effluents are expected from the sealed dry storage casks. However, activities associated with cask loading and decontamination may result in some small incremental liquid and gaseous effluent.... Incremental impacts under a general license are expected to be only a small fraction of that occurring from operation of the nuclear power station.

J.A. 467-68. Further, the NRC concluded that "the potential risk to the public health and safety due to accidents or sabotage is extremely small." J.A. 469. Finally, the EA states that "[b]ecause the Commission has determined that there are no significant environmental impacts associated with the proposed action, any alternative with equal or greater environmental impacts need not be evaluated." J.A. 470.

"An agency decision, based on an EA, that no EIS is required, can be overturned only if it is arbitrary, capricious, or an abuse of discretion." *Crounse Corp. v. I.C.C.*, 781 F.2d 1176, 1193 (6th Cir.), *cert. denied*, 479 U.S. 890, 107 S.Ct. 290, 291, 93 L.Ed.2d 264 (1986). We will not "substitute our judgment of the environmental impact for the judgment of the agency, once the agency has adequately studied the issue." *Id.* However, we will "determine whether the agency has, in fact, adequately studied the issue and taken a 'hard look' at the environmental consequences **42 F.3d 1519** of its decision." *Id.* "[A]n agency's determination not to prepare an EIS must be 'reasonable under the circumstances,' when viewed 'in the light of the mandatory requirements and the standard set by (NEPA).' " *Lower Alloways Creek Township v. Public Service Elec. & Gas Co.*, 687 F.2d 732, 742 (3d Cir.1982) (quoting *Minnesota Public Interest Research Group v. Butz*, 498 F.2d 1314, 1320 (8th Cir.1974)).

An environmental assessment is a "concise public document" prepared by a federal agency which serves to "[b]riefly provide sufficient evidence and analysis for determining whether to prepare an [EIS] or a finding of no significant impact." 40 C.F.R. § 1508.9.[5] The regulations also aid the agency's compliance with NEPA when no EIS is necessary. *Id.*

In this case, the NRC's reliance on the EA as well as its finding that an EIS is not required is neither arbitrary, capricious, nor an abuse of discretion. As noted, in the EA that the NRC prepared in conjunction with its 1990 Subpart K rulemaking, the agency found that its action would not be a major federal action significantly affecting the quality of the human environment and, therefore, no EIS was required. In its EA, the NRC analyzed (1) the radiological effects of the routine dry storage of spent nuclear fuel, (2) the non-radiological impacts of the routine dry storage of spent nuclear fuel, (3) the public health consequences of dry cask storage accidents, (4) the effects of radiological sabotage, and (5) the effects of decommissioning. The EA also noted that any alternative, especially an alternative licensed under site-specific licensing, would have similar environmental impacts. J.A. 464-69.

Further, in a 1984 Waste Confidence Decision, the NRC found "reasonable assurance, that, if necessary, spent fuel generated in any reactor can be stored safely and without significant environmental impacts for at least 30 years beyond the expiration of that reactor's operating licenses at that reactor's spent fuel storage basin, or at either onsite or offsite independent spent fuel storage installations." 49 Fed.Reg. 34,658 (1984); J.A. 411.In September 1990, in a review and final revision of its Waste

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[5] The regulations at 40 C.F.R. were prepared by the Council on Environmental Quality and are "grant[ed] 'substantial deference' as the authoritative guide for NEPA's interpretation." *California v. Block*, 690 F.2d 753, 763 (9th Cir.1982) (quoting *Andrus v. Sierra Club*, 442 U.S. 347, 358, 99 S.Ct. 2335, 2341, 60 L.Ed.2d 943 (1979)).

Confidence Decision, the NRC reaffirmed its finding of reasonable assurance that spent fuel from a reactor could be stored without significant environmental impact either onsite or offsite for at least 30 years beyond the expiration of the operating licenses for the reactor. 55 Fed.Reg. 38,474 (1990). Furthermore, in its rulemaking governing applications for site-specific independent spent fuel storage installation licenses and Monitored Retrievable Storage facility licenses, the NRC found:

> (1) past experience with water pool storage of spent fuel establishes the technology for long-term storage of spent fuel without affecting the health and safety of the public, (2) the proposed rulemaking to include the criteria of 10 CFR Part 72 for storing spent nuclear fuel and high-level radioactive waste does not significantly affect the environment.

53 Fed.Reg. 31,651, 31,658.

Furthermore, the NRC "tiered" its EA for the VSC-24 cask rulemaking on the numerous prior environmental reviews it had conducted with respect to the issue of onsite storage of spent fuel. The regulations of the Council on Environmental Quality, 40 C.F.R. § 1508.28, recognize that tiering of environmental impact statements on environmental analyses is appropriate when the sequence of statements or analyses is:

> (a) From a program, plan, or policy environmental impact statement to a program, plan, or policy statement or analysis of lesser scope or to a site-specific statement or analysis.
>
> (b) From an environmental impact statement on a specific action at an early stage (such as need and site selection) to a supplement (which is preferred) or a subsequent statement of analysis at a later stage (such as environmental mitigation). Tiering in such cases is appropriate when it helps the lead agency to focus on the issues **42 F.3d 1520** which are ripe for decision and exclude from consideration issues already decided or not yet ripe.

40 C.F.R. § 1508.28

In this case, the environmental impacts of the construction and operation of the nuclear power plant at the Palisades site were analyzed in the Final Environmental Statement prepared by the AEC[6] at the time it decided to license the Palisades plant for operation. Furthermore, as noted previously, the NRC had also previously considered the environmental effects of the onsite dry storage of spent nuclear fuel at various nuclear power plant sites at the time it promulgated 10 C.F.R. § 72 (Subpart K). Thus, it was appropriate for the agency to "tier" its environmental analysis at the time it decided to add the VSC-24 cask to the list of approved dry storage technologies at 10 C.F.R. § 72.214.

Moreover, the decision in *Limerick Ecology Action, Inc. v. United States Nuclear Regulatory Comm'n*, 869 F.2d 719 (3d Cir.1989), relied on by petitioners as support for their argument that a generic environmental analysis of the VSC-24 cask is not sufficient, is distinguishable from the facts of this case. The Third Circuit in *Limerick* held, among other things, that the NRC could not rely on an NRC policy statement to preclude consideration of "severe accident mitigation design alternatives" in a proceeding which was considering whether or not to issue a full power operating license for the Limerick Nuclear Power facility, which is located near Philadelphia, Pennsylvania. The Third Circuit acknowledged that pursuant to the Supreme Court's decision in *Baltimore Gas*, the "NRC may preclude consideration of generic issues by rulemaking." Id. at 733. The Third Circuit concluded that the decision in *Baltimore Gas* was not applicable to the situation before it because in *Baltimore Gas* the NRC was proceeding on the basis of a formal rulemaking, whereas the NRC was proceeding in its decision to license the Limerick power facility on the basis of an NRC policy statement. *Id.* at 736-37. The Third Circuit

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[6] The Atomic Energy Commission ("AEC") was the predecessor agency to the NRC.

considered the distinction between a policy statement and a rule to be crucial, because (1) unlike a rule, a policy statement is not entitled to deference by the courts; and (2) when an agency applies a policy statement, it must be prepared to support the policy embodied in the policy statement as if the policy statement did not exist. Id. at 736-37.

However, unlike the situation in *Limerick*, it is undisputed that the NRC was not proceeding on the basis of a policy statement in its decision to add the VSC-24 to the list of approved dry storage systems for spent nuclear fuel. Furthermore, the Third Circuit's decision not to rely on a generic environmental analysis in *Limerick* was sensible because that proceeding involved the decision to grant an operating license to a nuclear power generating facility. However, in this case, an operating license had already been granted to the Palisades facility, and, as a result, an extensive environmental analysis of the Palisades site had already been performed.

[14] In addition, petitioners claim that there are site-specific considerations unique to the Palisades facility, noting that a cask accident at Palisades would a have a different impact than a similar accident which occurred in Colorado. Appellants' Brief at 44. However, petitioners' argument ignores the fact that the addition of the VSC-24 cask to the list of approved casks in 10 C.F.R. § 72.214 will allow the cask to be used only at reactor sites which have been the subject of a comprehensive environmental analysis by the NRC and which have been granted a license for reactor operations on the basis of that review. Furthermore, other than the conclusory statement in their brief on appeal that the Palisades site is "a uniquely sensitive ecosystem--a high-risk erosion area along the shoreline of Lake Michigan," Appellants' Brief at 39, petitioners have not identified, much less established, any factor requiring a site-specific analysis before the VSC-24 cask could be added to the list of approved casks.

Petitioners also assert that as part of its EA the NRC failed to consider alternatives to the dry storage of spent fuel in VSC-24 casks at Palisades. As part of its "Environmental Assessment and Finding of No Significant Impact" the NRC stated:

> **42 F.3d 1521** The principal alternatives available to the NRC would be procedural in nature, whereby dry cask spent fuel storage could be approved under other existing or new Parts of Title 10, Code of Federal Regulations. Regardless of the method selected to approve such dry cask spent fuel storage, all would have similar environmental impacts.
>
> The NWPA directed that the Commission approve one or more technologies, that have been developed and demonstrated by [the Department of Energy], for the use of spent fuel storage at the sites of civilian nuclear power reactors without, to the extent practicable, the need for additional site-specific review. The NWPA also directed that the Commission, by rulemaking, set forth procedures for licensing the technology. Regulations for accomplishing this are in place. Therefore, the no action alternative is not acceptable.
>
> Alternative spent fuel storage technologies exist. However, at this time, the NRC considers them neither sufficiently demonstrated nor practicable for use under the general license provisions of Subpart K of 10 CFR Part 72 without additional site-specific reviews. If other storage technologies become more amenable to this type of action, they could be considered at a later time.

J.A. 744-45. Thus, the NRC did consider alternatives. Specifically, the NRC found the alternative technologies for spent fuel storage to have been neither sufficiently demonstrated nor practicable for use under a general license provision. As noted above, this type of technical decision by the NRC, operating at the frontiers of science, is entitled to great deference by the courts. *Baltimore Gas*, 462 U.S. at 103, 103 S.Ct. at 2255.

[15] Furthermore, petitioners' argument is essentially an attack on the policy choice made by the Congress, and embodied in the NWPA, to have the NRC consider, to the extent practicable, the licensing of onsite spent nuclear fuel storage at civilian nuclear power facilities through rulemaking. If petitioners are to obtain such relief, it must come from the Congress, either in the form of the repeal or amendments to the NWPA, and not from the courts.

Finally, petitioners have made no pretense of their desire to use their attack on the NRC's approval of the VSC-24 cask design to force the NRC to decide to cease production of irradiated fuel at Palisades by halting the operation of the nuclear power generating reactor. *See* Affidavit of Marvin Resnikoff, J.A. at 58-59. Because no federal repository is as yet available for the permanent disposal of spent irradiated fuel from nuclear power plants and because the spent fuel pools at many nuclear power plants, including Palisades, are at or near their storage capacities, many civilian nuclear power generating facilities could be forced to shut down if no additional storage space for spent nuclear fuel is available. *Id.* However, the Congressional policy embodied in the NWPA was to provide to the NRC a basis to approve various dry storage technologies for use at civilian nuclear power reactors without site-specific hearings. To the extent that petitioners object to any action by the NRC that would permit the continued operation of the Palisades plant by providing additional storage capacity for spent fuel, rather than merely objecting to the use of the VSC-24 cask at Palisades, they must seek such relief from the Congress, as opposed to the NRC or the courts.

Thus, we conclude that in its environmental assessment of the rule adding the VSC-24 cask to the list of approved storage systems at 10 C.F.R. § 72 (Subpart K), the NRC did take a "hard look" at the environmental consequences of its action, as required by NEPA. Therefore, the NRC's failure to prepare a site-specific environmental analysis concerning the use and operation of the VSC-24 casks at Palisades does not violate the NEPA.

III.

For the reasons stated, the decision of the district court in case No. 93-1710 is AFFIRMED. The petitions for review in the remaining three cases, Nos. 93-1646, 93-3613, and 93-3749, are DENIED.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

FRANK J. KELLEY, ATTORNEY GENERAL OF THE STATE OF MICHIGAN on behalf of the Citizens of the State of Michigan, and HERBERT P. READ, NORMAN W. PERMAN, SUSAN KIMMELMAN, and THE LAKE MICHIGAN FEDERATION,
Plaintiffs,

v.

File No. 4:93-CV-67
HON. ROBERT HOLMES BELL

IVAN SELIN, JAMES R. CURTISS, E. GAIL DE PLANQUE, FORREST J. REMICK, KENNETH C. ROGERS, and the UNITED STATES NUCLEAR REGULATORY COMMISSION,
Defendants,
and
CONSUMERS POWER COMPANY,
Intervenor-Defendant.

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OPINION

Michigan Attorney General Frank J. Kelley, three lakeshore private landowners, and The Lake Michigan Federation brought this action seeking to enjoin the United States Nuclear Regulatory Commission (NRC) and its officials from approving a new concrete cask, the "VSC-24," for outdoor storage of spent nuclear fuel at Consumers Power Company's Palisades Nuclear Power Plant in Covert Township (near South Haven), Michigan. Because of lack of subject matter jurisdiction, this action is DISMISSED.

Background

Prior to May 7, 1993, the Palisades Nuclear Power Plant had exclusively used water-filled pools inside the containment structure in the plant to store its spent nuclear fuel.

With its pools full, and in preparation for the plant refueling and maintenance work in early June 1993, Palisades is now turning to another method of storage: dry spent fuel storage casks. In particular, Palisades has begun to use the recently NRC-approved ventilated storage casks--the "VSC-24" casks--to store its spent nuclear fuel in the outdoors (in the sand dunes) near the shores of Lake Michigan.

Plaintiffs object to the use of the VSC-24 casks. They believe that the NRC had not adequately studied the environmental impact of the outdoor use of the VSC-24 casks, particularly for use in the Lake Michigan surroundings. They claim that the NRC violated the National Environmental Policy Act ("NEPA"), 42 U.S.C. § 4321 et seq., by failing to conduct a more thorough and site-specific environmental study of the outdoor use of the VSC-24 casks.

They brought this NEPA-based complaint--with an accompanying motion for a temporary restraining order ("TRO")--on May 4, 1993, three days before the effective date of the NRC's final rule allowing the use of the VSC-24 casks for temporary on-site storage of spent nuclear fuel. See 58 Fed. Reg. 17948. The complaint seeks to enjoin the NRC and its officials from taking any further action regarding the approval of the VSC-24 casks.

After Consumers Power was allowed to intervene to this lawsuit under Fed. R. Civ. P. 24(a), a hearing on the plaintiffs' request for a TRO was held on May 6, 1993. The focus of the hearing, however, centered on a threshold issue of jurisdiction raised in the initial opposition submissions by the NRC and Consumers Power.

At the hearing, the Court inquired whether, in light of the allegations in the complaint, it has subject matter jurisdiction over

the case to consider the TRO motion. In particular, the Court asked whether the Administrative Orders Review Act, commonly referred to as the Hobbs Act, required the case to be heard in the court of appeals. After some arguments, the parties were then requested by this Court to submit supplementary briefs on the jurisdictional issue on May 7, 1993.

After carefully reviewing the submissions, this court is now prepared to render its decision on the jurisdictional issue.

Discussion

It is, of course, axiomatic that before a district court may address the merits of a case, including whether a temporary restraining order should issue, it must be assured that it has subject matter jurisdiction over the case. A.E. Finley & Associates, Inc. v. United States, 898 F.2d 1165, 1167 (6th Cir. 1990); Rogers v. Stratton Industries, Inc., 798 F.2d 913, 917 (6th Cir. 1986) (per curiam). After careful review, this Court cannot be so assured.

A.

(1).

The Hobbs Act states that:

> The court of appeals ... has exclusive jurisdiction to enjoin, set aside, suspend (in whole or in part), or to determine the validity of —
>
> > All final orders of the Atomic Energy Commission [now the Nuclear Regulatory Commission] made reviewable by section 2239 of title 42.

28 U.S.C. § 2342(4).

Subsection (b) of 42 U.S.C. § 2239 then provides that the Hobbs Act covers review of "[a]ny final order entered in any proceeding of the kind specified in subsection (a) [of section 2239]." And subsection (a) proceedings include those "for the issuance or modification of rules and regulations dealing with the

activities of licensees." 42 U.S.C. § 2239(a)(1)(A). Accordingly, reading the Hobbs Act in conjunction with 42 U.S.C. § 2239 leads to an easy conclusion that a "final order" entered in "any proceeding" for the "issuance or modification of rules and regulations dealing with the activities of licensees" is only reviewable by the court of appeals, not the district court.

That construction does not, however, clearly explain what the term "final order" means under the Hobbs Act. And because that term is undefined by the Act, some further review is needed.

(2).

Contrary to the plain--and what appears to be a narrow---statutory language of the Hobbs Act, both words in the term "final order" have been broadly construed. First, courts have taken a flexible view that an order is "final" if it "'imposes an obligation, denies a right, or fixes some legal relationship, usually at the consummation of an administrative process.'" E.g., Dickinson v. Zech, 846 F.2d 369, 371 (6th Cir. 1988) (quoting Natural Resources Council v. NRC, 680 F.2d 810, 815 (D.C. Cir. 1982)); Sierra Club v. U.S. NRC, 862 F.2d 222, 225 (9th Cir. 1988). Second, courts have recognized a "growing understanding that regulations and rules were reviewable 'orders' under the Hobbs Act." Commonwealth Edison Co. v. U.S. NRC, 830 F.2d 610, 615 (7th Cir. 1987) (citing 4 Davis, Administrative Law § 23.5 (2d ed. 1982)); see also City of Rochester v. Bond, 603 F.2d 927, 933 n.26 (D.C. Cir. 1979) (noting that courts have construed "order" for purposes of special review statues more expansively ... to permit direct review of regulations promulgated through informal notice-and-comment rulemaking"). Accordingly, it seems obvious that the NRC's promulgation of a "final rule or regulation," which fixes a legal relationship and which occurs at the consummation of an administrative process, constitutes a "final order" under the Hobbs Act to be reviewed by the courts of appeals. See cf. N.L.R.B. Union v. FLRA, 834 F.2d 191, 195 (D.C. Cir. 1987) (noting the same in the context of the Federal Labor Relations

Authority's final rules and regulations). District of Columbia Court of Appeals--have routinely examined various NRC rules and regulations under the Hobbs Act jurisdiction. See, e.g., Nuclear Information Resources Service v. NRC, 969 F.2d 1169 (D.C. Cir. 1992) (en banc); Professional Reactor Operator Society v. U.S. NRC, 939 F.2d 1047 (D.C. Cir. 1991); Union of Concerned Scientists v. NRC, 920 F. 2d 50 (D.C. Cir. 1990) And this practice appears consistent with the Supreme Court's teaching that a review of an administrative decision should initially vest in the courts of appeals unless there is a "firm indication" that Congress intended to do otherwise. See Florida Power & Light Co. v. Lorion, 470 U.S. 729, 745 (1985) (a Hobbs Act case).

(B).

Turning to this case, the question is whether this case falls under the described ambit of the Hobbs Act. That is, whether the plaintiffs in this case are seeking to challenge the April 7, 1993 issuance of the NRC's final rule on VSC-24, which is, as the foregoing discussion indicates, a "final order" of a "proceeding for the issuance ... of rules and regulations" within the meaning of the Atomic Energy Act, 42 U.S.C. § 2239. This Court believes so.

(1).

Plaintiffs' four-count "Verified Complaint for Injunctive and Other Relief" is revealing. In the Complaint, the plaintiffs seek a review of the claims that the NRC and its officials acted in contravention to the National Environmental Policy Act ("NEPA"), 42 U.S. C. § 4321 et seq., by failing to conduct a more thorough environmental impact study of the use of the newly approved VSC-24 casks for outdoor storage of spent nuclear fuel at the Palisades plant. But in their words, the plaintiffs challenge, with respect to the Palisades plant, the

> Defendants' position, in substance, that "(t)he [Environmental Assessment] covering the proposed rule [as set forth at 58 Fed. Reg. 17948

> and issued on April 7, 1993], as well as the finding of no significant impact (FONSI) prepared and published for this rulemaking, fully comply with the NRC environmental regulations in 10 CFR Part 51 ... and that further analyses are therefore not legally required." (Final Rule, Exhibit 1, at p. 63.).

Complaint ¶ 43. In other words, what the plaintiffs are really challenging is the NRC's alleged NEPA-violating inactivity stemming from the promulgation of the final rule approving the use of the VSC-24 casks for any location. However, in order to examine the propriety of the NRC's inaction, this Court must necessarily examine what occurred at the NRC's rulemaking process for the issuance of a final rule for the VSC-24 cask. The NRC's alleged NEPA violations cannot be divorced from the rulemaking process and its determinations therein.

The four counts contained in the plaintiffs' Complaint do not contradict this view. Plaintiffs allege the following:

Count 1: that the defendants failed to prepare an "Environmental Impact Statement" ("EIS") on the question of allowing storage of the nuclear spent fuel in the VSC-24 casks at Palisades, in violation of NEPA, see Complaint ¶¶ 54-58;

Count 2: that the defendants failed to prepare an "Environmental Assessment" ("EA") before permitting the outdoor storage of the radioactive wastes in the VSC-24 casks at Palisades, in violation of NEPA, see Complaint ¶¶ 60-65;

Count 3: that the defendants failed to file an adequate, general EA as to the VSC-24 casks, in violation of NEPA, see Complaint ¶¶ 67-71; and

Count 4: that the defendants failed to adequately consider alternatives to outdoor storage of nuclear spent fuel in the VSC-24 casks, in violation of NEPA. See Complaint 11 74-79.

Upon careful examination, it is clear that each of the four counts in the Complaint, though separately setting forth what the NRC and its officials should have done regarding the approval of the VSC-24 casks for outdoor storage use, has a common thread: all of them implicates, directly or indirectly, the NRC's April 7, 1993 issuance of final rule adding a VSC-24 cask to its list of casks approved for temporary on-site storage of spent nuclear fuel. See 58 Fed. Reg. 17948.

To put its somewhat differently, in order for this Court to evaluate the merits of any of the four counts, this Court must perforce examine the NRC's final rule and its rulemaking process approving the use of VSC-24 casks. This Court must then determine whether, in light of the plaintiffs' allegations in the Complaint, the final rule and the rulemaking process approving the use of the VSC-24 casks at any location were consistent with NEPA. The Hobbs Act, however, prohibits this Court from undertaking such examination and determination of a final rule of the NRC.[1/]

To be sure, one of the plaintiffs appears to recognize this fatal flaw. At the hearing held on May 6, 1993, this Court inquired of the Assistant Michigan Attorney General about the nature and scope of the action. After learning that the action was "an original action," not an "administrative appeals action," this Court engaged in the following exchange:

[1/] Plaintiffs in their supplemental submission assert that Counts 1, 2, and 4 of the Complaint do not involve NRC's final rule adding a VSC-24 cask to its list of approved storage casks. As explained in the text above, a fair reading of the Complaint belies that assertion. Further, it appears that even if Counts 1, 2, and 4 do not directly implicate the VSC-24 final rule, that final rule and the rulemaking process must be examined, at the very least, as a starting point. Certainly, it is difficult to fathom--and the plaintiffs have not explained, except through an inapposite hypothetical--how Counts 1, 2, or 4 could be examined in a vacuum without a reference to the VSC-24 final rule.

> THE COURT: So I can forget about what happened in front of the Nuclear Regulatory Commission?
>
> [ASSISTANT ATTORNEY GENERAL]: Your honor. I wouldn't pretend to stand here and try to suggest to this Court that there is not going to be something that will relate to this process. It definitely relates to the casks that they have chosen to construct on the shores of Lake Michigan.

Transcript of the Hearing Re: Motion for Temporary Restraining order at 13. However, the Assistant Attorney General was quick to explain that the relationship with the NRC proceedings was not sufficient to bring this action within the ambit of the Hobbs Act because the gravamen of the Complaint was the challenge to the NRC's imminent issuance of a "Certificate of Compliance" to Consumers Power, which authorizes Consumers Power to load and use the VSC-24 casks at the Palisades plant. See id. at 14.[2]

Subsequently, when it was explained that a Certificate of Compliance had already been issued on May 3, 1993 by the NRC to the vendor of the VSC-24 casks, Pacific Sierra Nuclear Associates (not Consumers Power), the Assistant Attorney General appeared to equivocate further. In an answer to the Court's continued inquiry regarding the nature and scope of the action, the Assistant Attorney General seemed to suggest that the focus of the action, at that juncture, was an examination of the allegedly inadequate rulemaking process of the NRC--the precise review that the district court cannot conduct under the Hobbs Act. See id. at 29.

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[2] Curiously, the other plaintiffs have subsequently distanced themselves from this position staked by the Assistant Attorney General. See Plaintiffs' Memorandum in Support of Court's Jurisdiction Over Plaintiffs' NEPA Claims at 7 n. 5.

Of course, even if the challenge to the NRC's issuance of a Certificate of Compliance were the crux of the Complaint, that does not change the matter. A Certificate of Compliance is issued by the NRC to a vendor of the storage cask, and certifies the vendor's compliance with the NRC's requirements for the cask. 10 C.F.R. § 72-238. As the NRC and Consumers Power both point out, it appears that NRC's issuance of a Certificate of Compliance is "part and parcel" of the rulemaking process of the NRC. See 10 C.F.R. Part 72, Subparts K and L. As such, challenging an issuance of a Certificate of Compliance is no different than challenging a final rule itself, which is prohibited from the district court's review by the Hobbs Act.

In sum, this Court agrees with the NRC that the plaintiffs' real challenge here is that the NRC cannot make "generic determinations" on the use of dry spent fuel storage casks, such as the VSC-24 casks, but "must make a site-by-site evaluation of the propriety of using the casks." Opposition of U.S. Nuclear Regulatory Commission to Plaintiffs' Motion for a Temporary Restraining Order at 7 n. 6; see also U.S. Nuclear Regulatory commission's Supplemental Memorandum on Jurisdiction at 6-7 ("Plaintiffs' main grievance appears to be a dissatisfaction with the general license system authorized by the Nuclear Waste Policy Act and implemented in 1990 by the NRC in 10 C.F.R. Part 72, Subpart K."). But that challenge, of course, of the NRC's rules and rulemaking process must be brought in the court of appeals, not this district court.

(2).

Plaintiffs nonetheless advance two additional arguments to consider. Both, however, are unpersuasive.

First, the plaintiffs suggest that this Court should exercise what amounts to "concurrent jurisdiction" with the court of appeals to review NRC's final rule. Plaintiffs cite Susquehanna Valley Alliance v. Three Mile Island Nuclear Reactor, 619 F.2d 231 (3d

Cir. 1980), cert. denied sub nom General Public Utilities Corp. v. Susquehanna Valley Alliance, 449 U.S. 1096 (1981). Plaintiffs further contend that the circumstances there are "remarkably similar" to this case. This Court cannot agree.

In Susquehanna, the Third Circuit allowed concurrent jurisdiction for a NEPA claim against the NRC in the district court, even though the Hobbs Act required exclusive appellate jurisdiction. In so doing, the Third Circuit explained that not only was the administrative record incomplete, but a final order of the NRC had not been made. See 619 F.2d at 241. In other words, the statutory requirement of "final order" of the Hobbs Act had not even been satisfied. That is not the case here. See West Chicago v. U.S. NRC, 701 F.2d 632, 652 n. 21 (7th Cir. 1983).

Second, perhaps in their attempt to bring this case closer to Susquehanna, the plaintiffs argue that there has been no "final order" within the meaning of the Hobbs Act. Plaintiffs mainly rely on the fact that there had been no formal adjudicative-type "hearing" as provided under 42 U.S.C. § 2239(a)(1). Plaintiffs believe that such a hearing is required for a "final order."

Plaintiffs' argument is not well-taken. Because section 2239(a) requires the NRC to hold a "hearing" without specifying that the "hearing" be held "on the record," no formal adjudicative type of hearing is required. See 5 U.S.C. § 553(c); United States v. Florida East Coast Ry. Co., 410 U.S. 224, 234-38 (1973). Only "notice and comment" type of informal proceedings is required under section 2239(a). See Siegel v. AEC, 400 F.2d 778, 785-86 (D.C. Cir. 1968). And such a proceeding was used here to satisfy the hearing requirement of a "final order."

(C).

Finally, this Court does not desire to be misunderstood. In dismissing this suit for lack of subject matter jurisdiction, the Court is obviously not addressing the merits of the claims in the Complaint. In other words, this Court is not passing any judgment

on the soundness of the alleged actions of the NRC or Consumers Power.

Conclusion

For the reasons stated, the defendants' and the intervenor--defendant's requests for dismissal on the grounds of subject matter jurisdiction are hereby GRANTED. Plaintiffs may file a petition for review of the NRC's final rule with the appropriate United States Court of Appeals.

An order consistent with this opinion shall issue forthwith.

Dated: May 10, 1993

/s/ Robert Holmes Bell
ROBERT HOLMES BELL
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

FRANK J. KELLEY, ATTORNEY GENERAL OF THE STATE OF MICHIGAN on behalf of the Citizens of the State of Michigan, and HERBERT P. READ, NORMAN W. PERMAN, SUSAN KIMMELMAN, and THE LAKE MICHIGAN FEDERATION,
Plaintiffs,

v.

File No. 4:93-CV-67
HON. ROBERT HOLMES BELL

IVAN SELIN, JAMES R. CURTISS, E. GAIL DE PLANQUE, FORREST J. REMICK, KENNETH C. ROGERS, and the UNITED STATES NUCLEAR REGULATORY COMMISSION,
Defendants,
and
CONSUMERS POWER COMPANY,
Intervenor-Defendant.

---/

ORDER

In accordance with the opinion entered this date, the defendants' and the intervenor-defendant's requests for dismissal on the grounds of subject matter jurisdiction are hereby GRANTED. Plaintiffs may file a petition for review of the NRC's final rule with the appropriate United States Court of Appeals.

IT IS SO ORDERED.

Dated: May 10, 1993

/s/ Robert Holmes Bell
ROBERT HOLMES BELL
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

FRANK J. KELLEY, ATTORNEY GENERAL OF THE STATE OF MICHIGAN on behalf of the Citizens of the State of Michigan, and HERBERT P. READ, NORMAN W. PERMAN, SUSAN KIMMELMAN, and THE LAKE MICHIGAN FEDERATION,
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Defendants,
and
CONSUMERS POWER COMPANY,
Intervenor-Defendant.

_____/

ORDER GRANTING MOTION TO AMEND ORDER OF MAY 10, 1993

Plaintiffs seek to amend this Court's order of May 10, 1993 dismissing this action for lack of subject matter jurisdiction. Plaintiffs argue that the order should be amended to include the following language:

> In accordance with the opinion entered this date, this Court is without subject matter jurisdiction over the action and the action is hereby transferred to the United States Court of Appeals for the Sixth Circuit pursuant to 28 U.S.C. 1631 [sic].

Motion to Amend Order at 3.

Under 28 U.S.C. § 1631, a district court may transfer a case to another court upon finding that there is a want of jurisdiction. See Commodities Export Co. v. U.S. Customs Service, 888 F.2d 431, 439 (6th Cir. 1989), cert. denied, 113 S. Ct. 96 (1992). Such a transfer, however, must be premised on the "in the interest of justice" grounds. Id.

In this case, the Court finds that it is "in the interest of justice" to transfer the action to the requested Sixth Circuit Court of Appeals. Though this Court believes that it lacks subject matter jurisdiction over the case by virtue of 28 U.S.C. § 2342(4), that nature of the case is such that an expeditious review of the merits by a proper court appears necessary.

Accordingly, this Court's order of May 10, 1993 dismissing the action for lack of subject matter jurisdiction is AMENDED insofar as to allow a transfer of the action to the United States Court of Appeals for the Sixth Circuit under 28 U.S.C. § 1631.

IT IS SO ORDERED.

Dated: May 10, 1993

/s/ Robert Holmes Bell
ROBERT HOLMES BELL
UNITED STATES DISTRICT JUDGE

STATUTES INVOLVED

28 U.S.C. § 2342(4)

Hobbs Act

§ *2342(4)* Jurisdiction of court of appeals

The court of appeals (other than the United States Court of Appeals for the Federal Circuit) has exclusive jurisdiction to enjoin, set aside, suspend (in whole or in part), or to determine the validity of

(4) all final orders of the Atomic Energy Commission made reviewable by section 2239 of title 42.

* * * * *

28 U.S.C. § 2344

Hobbs Act

§ *2344* Review of orders; time; notice; contents of petition; service

On the entry of a final order reviewable under this chapter, the agency shall promptly give notice thereof by service or publication in accordance with its rules. Any party aggrieved by the final order may, within 60 days after its entry, file a petition to review the order in the court of appeals wherein venue lies. The action shall be against the United States. The petition shall contain a concise statement of

(1) the nature of the proceedings as to which review is sought;
(2) the facts on which venue is based;
(3) the grounds on which relief is sought; and
(4) the relief prayed.

The petitioner shall attach to the petition, as exhibits, copies of the order, report, or decision of the agency. The clerk shall serve a true copy of the petition on the agency and on the Attorney General by registered mail, with request for a return receipt.

* * * * *

42 U.S.C. § 2239(a)

Atomic Energy Act

§ *2239(a)* Hearings and judicial review.

(a)(1)(A) In any proceeding under this chapter, for the granting, suspending, revoking, or amending of any license or construction permit, or application to transfer control, and in any proceeding for the issuance or modification of rules and regulations dealing with the activities of licensees, and in any proceeding for the payment of compensation, an award or royalties under sections 2183, 2187, 2236(c) or 2238 of this title, the Commission shall grant a hearing upon the request of any person whose interest may be affected by the proceeding, and shall admit any such person as a party to such proceeding. The Commission shall hold a hearing after thirty days' notice and publication once in the Federal Register, on each application under section 2133 or 2134(b) of this title for a construction permit for a facility, and on any application under section 2134(c) of this title for a construction permit for a testing facility. In cases where such a construction permit has been issued following the holding of such a hearing, the Commission may, in the absence of a request therefor by any person whose interest may be affected, issue an operating license or an amendment to a construction permit or an amendment to an operating license without a hearing, but upon thirty days' notice and publication once in the Federal Register of its intent to do so. The Commission may dispense with such thirty days' notice and publication with respect to any application for an amendment to a construction permit or an amendment to an operating license upon a determination by the Commission that the amendment involves no significant hazards consideration.

* * * * *

42 U.S.C. § 4321

National Environmental Policy Act

§ *4321* Congressional declaration of purpose.

The purposes of this chapter are: To declare a national policy which will encourage productive and enjoyable harmony between man and his environment; to promote efforts which will prevent or eliminate damage to the environment and biosphere and stimulate the health and welfare of man; to enrich the understanding of the ecological systems and natural resources important to the Nation; and to establish a Council on Environmental Quality.

* * * * *

42 U.S.C. § 10198(a)

Nuclear Waste Policy Act

§ *10198* Research and development on spent nuclear fuel.

(a) Demonstration and cooperative programs.

The Secretary shall establish a demonstration program, in cooperation with the private sector, for the dry storage of spent nuclear fuel at civilian nuclear power reactor sites, with the objective of establishing one or more technologies that the Commission may, by rule, approve for use at the sites of civilian nuclear power reactors without, to the maximum extent practicable, the need for additional site-specific approvals by the Commission. Not later than 1 year after January 7, 1983, the Secretary shall select at least 1, but not more than 3, sites evaluated under section 10194 of this title at such power reactors. In selecting such site or sites, the Secretary shall give preference to civilian nuclear power reactors that will soon have a shortage of interim storage capacity for spent nuclear fuel. Subject to reaching agreement as provided in subsection (b) of this section, the Secretary shall undertake activities to assist such power reactors with demonstration projects at such sites, which may use one of the following types of alternate storage technologies: spent nuclear fuel storage casks, caissons, or silos. The Secretary shall also undertake a cooperative program with civilian nuclear power reactors to encourage the development

of the technology for spent nuclear fuel rod consolidation in existing power reactor water storage basins.

FEDERAL REGULATIONS INVOLVED

10 C.F.R. § 72.210 to 72.220

Subpart K - General License for Storage of Spent Fuel at Power Reactor Sites

§ *72.210* General license issued.

A general license is hereby issued for the storage of spent fuel in an independent spent fuel storage installation at power reactor sites to persons authorized to possess or operate nuclear power reactors under part 50 of this chapter.

* * * * *

§ *72.212* Conditions of general license issued under § 72.210.

(a)(1) The general license is limited to that spent fuel which the general licensee is authorized to possess at the site under the specific license for the site.

(2) This general license is limited to storage of spent fuel in casks approved under the provisions of this part.

(3) The general license for the storage of spent fuel in each cask fabricated under a Certificate of Compliance terminates 20 years after the date that the particular cask is first used by the general licensee to store spent fuel, unless the cask's Certificate of Compliance is renewed, in which case the general license terminates 20 years after the cask's Certificate of Compliance renewal date. In the event that a cask vendor does not apply for a cask model reapproval under § 72.240, any cask user or user's representative may apply for a cask design reapproval. If a Certificate of Compliance expires, casks of that design must be removed from service after a storage period not to exceed 20 years.

(b) The general licensee shall:

(1)(i) Notify the Nuclear Regulatory Commission using instructions in § 72.4 at least 90 days prior to first storage of spent fuel under this general license. The notice may be in the form of a letter, but must contain the licensee's name, address, reactor license and docket numbers, and the name and means of contacting

a person responsible for providing additional information concerning spent fuel under this general license. A copy of the submittal must be sent to the administrator of the appropriate Nuclear Regulatory Commission regional office listed in appendix D to part 20 of this chapter.

(ii) Register use of each cask with the Nuclear Regulatory Commission no later than 30 days after using that cask to store spent fuel. This registration may be accomplished by submitting a letter using instructions in § 72.4 containing the following information: the licensee's name and address, the licensee's reactor license and docket numbers, the name and title of a person responsible for providing additional information concerning spent fuel storage under this general license, the cask certificate and model numbers, and the cask identification number. A copy of each submittal must be sent to the administrator of the appropriate Nuclear Regulatory Commission regional office listed in appendix D to part 20 of this chapter.

(iii) Fee. Fees for inspections related to spent fuel storage under this general license are those shown in § 170.31 of this chapter.

(2) Perform written evaluations, prior to use, that establish that (i) conditions set forth in the Certificate of Compliance have been met; (ii) cask storage pads and areas have been designed to adequately support the statis load of the stored casks; and (iii) the requirements of § 72.104 have been met. A copy of this record must be retained until spent fuel is no longer stored under the general license issued under § 72.210.

(3) Review the Safety Analysis Report (SAR) referenced in the Certificate of Compliance and the related NRC Safety Evaluation Report, prior to use of the general license, to determine whether or not the reactor site parameters, including analyses of earthquake intensity and tornado missiles, are enveloped by the cask design bases considered in these reports. The results of this review must be documented in the evaluation made in paragraph (b)(2) of this section.

(4) Prior to use of the general license, determine whether activities related to storage of spent fuel under this general license involve any unreviewed facility safety question or change in the facility technical specifications, as provided under § 50.59. Results of this determination must be documented in the evaluation made in paragraph (b)(2) of this section.

(5) Protect the spent fuel against the design basis threat of radiological sabotage in accordance with the same provisions and requirements as are set forth in the licensee's physical security plan pursuant to § 73.55 of this chapter with the following additional conditions and exceptions.

(i) The physical security organization and program for the facility must be modified as necessary to assure that activities conducted under this general license do not decrease the effectiveness of the protection of vital equipment in accordance with § 73.55 of this chapter.

(ii) Storage of spent fuel must be within a protected area, in accordance with § 73.55(c) of this chapter, but need not be within a separate vital area. Existing protected areas may be expanded or new protected areas added for the purpose of storage of spent fuel in accordance with this general license.

(iii) For purposes of this general license, searches required by § 73.55(d)(1) of this chapter before admission to a new protected area may be performed by physical pat-down searches of persons in lieu of firearms and explosives detection equipment.

(iv) The observational capability required by § 73.55(h)(6) of this chapter as applied to a new protected area may be provided by a guard or watchman on patrol in lieu of closed circuit television.

(v) For the purpose of this general license, the licensee is exempt from §§ 73.55(h)(4)(iii)(A) and 73.55(h)(5) of this chapter.

(6) Review the reactor emergency plan, quality assurance program, training program, and radiation protection program to determine if their effectiveness is decreased and, if so, prepare the necessary changes and seek and obtain the necessary approvals.

(7) Maintain a copy of the Certificate of Compliance and documents referenced in the certificate for each cask model used for storage of spent fuel, until use of the cask model is discontinued. The licensee shall comply with the terms and conditions of the certificate.

(8)(i) Accurately maintain the record provided by the cask supplier for each cask that shows, in addition to the information provided by the cask vendor, the following:

(A) The name and address of the cask vendor or lessor;

(B) The listing of spent fuel stored in the cask; and

(C) Any maintenance performed on the cask.

(ii) This record must include sufficient information to furnish documentary evidence that any testing and maintenance of the cask has been conducted under an NRC-approved quality assurance program.

(iii) In the event that a cask is sold, leased, loaned, or otherwise transferred to another registered user, this record must also be transferred to and must be accurately maintained by the new registered user. This record must be maintained by the current cask user during the period that the cask is used for storage of spent fuel and retained by the last user until decommissioning of the cask is complete.

(9) Conduct activities related to storage of spent fuel under this general license only in accordance with written procedures.

(10) Make records and casks available to the Commission for inspection.

* * * * *

§ *72.214* List of approved spent fuel storage casks.

The following casks are approved for storage of spent fuel under the conditions specified in their Certificates of Compliance.

Certificate Number: 1000
SAR Submitted by: General Nuclear Systems, Inc.
SAR Title: Topical Safety Analysis Report for the Castor V/21 Cask Independent Spent Fuel Storage Installation (Dry Storage)
Docket Number: 72-1000
Certification Expiration Date: August 17, 2010
Model Number: CASTOR V/21

Certificate Number: 1001
SAR Submitted by: Westinghouse Electric Corporation
SAR Title: Topical Safety Analysis Report for the Westinghouse MC-10 Cask for an Independent Spent Fuel Storage Installation (Dry Storage)
Docket Number: 72-1001
Certification Expiration Date: August 17, 2010
Model Number: MC-10

Certificate Number: 1002
SAR Submitted by: Nuclear Assurance Corporation
SAR Title: Topical Safety Analysis Report for the NAC Storage/Transport Cask for Use at an Independent Spent Fuel Storage Installation
Docket Number: 72-1002
Certification Expiration Date: August 17, 2010
Model Number: NAC S/T

Certificate Number: 1003
SAR Submitted by: Nuclear Assurance Corporation
SAR Title: Topical Safety Analysis Report for the NAC Storage/Transport Cask Containing Consolidated Fuel for Use at an Independent Spent Fuel Storage Installation
Docket Number: 72-1003
Certification Expiration Date: August 17, 2010
Model Number: NAC-C28 S/T

Certificate Number: 1005
SAR Submitted by: Transnuclear, Inc.
SAR Title: TN-24 Dry Storage Cask Topical Report
Docket Number: 72-1005
Certification Expiration Date: November 4, 2013
Model Number: TN-24

Certificate Number: 1007
SAR Submitted by: Pacific Sierra Nuclear Associates
SAR Title: Safety Analysis Report for the Ventilated Storage Cask System
Docket Number: 72-1007
Certification Expiration Date: May 7, 2013
Model Number: VSC-24

* * * * *

§ *72.216* Reports.

(a) The general licensee shall make an initial report under § 50.72(b)(2)(vii) of this chapter of any:

(1) Defect discovered in any spent fuel storage cask structure, system, or component which is important to safety; or

(2) Instance in which there is a significant reduction in the effectiveness of any spent fuel storage cask confinement system during use.

(b) A written report, including a description of the means employed to repair any defects or damage and prevent recurrence, must be submitted using instructions in § 72.4 within 30 days of the report submitted in paragraph (a) of this section. A copy of the written report must be sent to the administrator of the appropriate Nuclear Regulatory Commission regional office shown in appendix D to part 20 of this chapter.

* * * * *

§ *72.218* Termination of licenses.

(a) The notification regarding the program for the management of spent fuel at the reactor required by § 50.54(bb) of this chapter must include a plan for removal of the spent fuel stored under this

general license from the reactor site. The plan must show how the spent fuel will be managed before starting to decommission systems and components needed for moving, unloading, and shipping this spent fuel.

(b) An application for termination of the reactor operating license submitted under § 50.82 of this chapter must contain a description of how the spent fuel stored under this general license will be removed from the reactor site.

(c) The reactor licensee shall send a copy of submittals under § 72.218(a) and (b) to the administrator of the appropriate Nuclear Regulatory Commission regional office shown in appendix D to part 20 of this chapter.

* * * * *

§ *72.220* Violations.

This general license is subject to the provisions of § 72.84 for violation of the regulations under this part.

UNITED STATES ENVIRONMENTAL
PROTECTION AGENCY
REGION 5
77 WEST JACKSON BOULEVARD
CHICAGO, IL 60604-3590
12/30/93

REPLY TO THE ATTENTION OF
ME-19J

Mr. James M. Taylor
Executive Director for Operations
United States Nuclear Regulatory Commission
Washington, D.C. 20046-0001

Dear Mr. Taylor:

We are writing in regards to the proposed dry cask storage proposal for Consumers Power Company's Palisades Nuclear Power Plant near South Haven, Michigan and Northern States Power, Prairie Island Nuclear Power Plant. We have recently become aware of both of these proposals. From our understanding, both Consumers Power and Northern States Power have been granted approval by your agency to use a dry cask storage system to store spent nuclear fuel on a concrete pad on each facility's property. The license for storage of these spent fuel rods is for 20 years with the potential of extending the license for an additional twenty years.

The dry cask storage system was authorized by the Nuclear Waste Policy Act of 1982, Section 133. Your agency has assessed dry cask storage systems generically and has also evaluated the environmental impacts of them generically. The Consumers Power Company's dry cask storage site will be adjacent to Lake Michigan which is a valuable resource providing drinking water and Prairie Island Nuclear Power Plant is situated on an island in the Mississippi River, another valuable natural resource. We believe the potential for significant adverse impact to either Lake Michigan or the Mississippi River is real and was not fully assessed in the generic environmental assessment prepared for the dry cast storage process. Therefore, under our authority under Section 309 of the

Clean Air Act, we are requesting to review the environmental documentation that you have used to determine that natural environment. The site specific conditions and the valuable resources of Lake Michigan and the Mississippi River warrant a full and complete evaluation of the impacts and the review of this analysis by other Federal and State agencies as well as the interested public.

In addition, the Prairie Island Nuclear Power Plant shares the island with the Prairie Island Dakota Community. It does not appear that the impact to the Tribe was assessed in the generic environmental impact statement. You may need to evaluate your agency's trust responsibilities, to the Indian Tribe, regarding the siting of the dry cast storage area at the Prairie Island Nuclear Power Plant.

We will appreciate your cooperation in this matter and look forward to a timely response. If you have any questions, please feel free to contact Mr. Robert Springer, Assistant Regional Administrator for Planning and Management, at 312/353-2024.

Sincerely yours,

/s/ Valdas V. Adamkus

Valdas V. Adamkus
Regional Administrator

United States
Nuclear Regulatory Commission
Washington, D.C. 20555-0001

January 30, 1994

Mr. Valdas V. Adamkus
Regional Administrator, Region 5
U.S. Environmental Protection Agency
77 West Jackson Boulevard
Chicago, IL 60604-3590

Dear Mr. Adamkus:

I am pleased to respond to your letter of December 30, 1993, in which you state that having recently become aware of proposals for dry cask storage at the Palisades and Prairie Island nuclear power plants, your office desires copies of the environmental documentation relating to those proposals. While we are of course happy to provide the documents you seek, you should be aware that all of the environmental documentation relating to cask design used at Palisades (the "VSC-24") was sent to the U.S. Environmental Protection Agency (EPA) headquarters some six months ago, with copies to a member of the EPA Region 5 staff. (See the attached letter of August 4, 1993, to Ms. Susan Offerdal, EPA.)

Since that time, there have been a number of developments relating to dry cask storage that may be of interest to you. Most notably, last fall the Government filed its brief in Kelley v. Selin, Nos. 93-1646 et al., in the U.S. Court of Appeals for the Sixth Circuit, involving the casks at Palisades.

The central issue in this case, which is now pending before the court (no date for oral argument has so far been established) was the procedure used by the U.S. Nuclear Regulatory Commission to approve the "VSC-24" spent fuel storage casks. The NRC's position was that its procedure for approving the cask design (by generic rulemaking, without the need for additional site-specific approvals) was consistent with the clear statutory directive of

Congress in the National Waste Policy Act of 1982. Congress, seeking to foster the development of "off-the-shelf" at-reactor spent fuel storage technologies that could be used safely at any nuclear power plant site, directed NRC to use generic approvals, without additional site-specific approvals (and attendant adjudicatory hearings), "to the maximum extent practicable." NRC's technical judgment, reflected in a 1990 rulemaking, was that this approach was indeed fully "practicable."

The essence of the petitioners' challenge is that there is something unique about the Palisades site that warrants a site-specific environmental analysis, notwithstanding the statutory directive. The Government's brief argues in response that the NRC's 1990 rulemaking, in which the petitioners did not participate, established the principle that no site-specific analysis is necessary or desirable so long as the NRC can find, generically, that a particular cask design can withstand the range of environmental and climatic conditions representative of NRC-licensed nuclear plant sites for which its use is approved.

In fact, the environmental analysis underlying the decision on the VSC-24 cask is extensive. The record reflects a series of "tiered" analyses, beginning with a Generic Environmental Impact Statement in 1979 on the handling and storage of spent fuel, and encompassing, over a period of years, a number of related and progressively more specific findings, including environmental assessments of the 1990 and 1993 rulemakings. Moreover, the Palisades site was the subject of a full environmental impact statement at the time of the initial licensing of the plant.

In sum, because the generically approved VSC-24 cask can only be used on sites already approved for nuclear power plants, the result at Palisades is that a safe and exhaustively reviewed technology has been installed on a safe and exhaustively reviewed site.

A copy of the brief is enclosed for your information.

The installation of spent fuel storage casks at Prairie Island, on the other hand, took place through an individual licensing action rather than a rulemaking. As the NRC noted in its August 4, 1992, Federal Register notice on the subject, a copy of which is enclosed, an environmental assessment found that there would be no significant impacts from construction of the casks. Radiological impacts from gaseous and liquid effluents were found to be minimal, falling within the scope of impacts evaluated for licensed reactor operations and controlled by the existing technical specifications for the Prairie Island plant.

The 1992 notice noted that the environmental assessment relied on a number of previous environmental documents, including the 1973 Final Environmental Statement for the Prairie Island plant; the 1991 Final Environmental Impact Statement on the Prairie Island Independent Spent Fuel Storage Installation, prepared by the Minnesota Environmental Quality Board; EPA's Federal Guidance Report #11, EPA 520, 1-88-020; and the 1979 Final Generic Environmental Statement on the handling and storage of spent fuel. The environmental assessment took note of the presence of a nearby Indian Tribe community and of the Bartron Archaeological Site, an area including evidence of an Indian village and burial mounds, which was discovered at the southern boundary of the plant site and was added to the National Register of Historic Places in February 1971.

A further instance of NRC's due recognition of its responsibility to the Indian Tribe in the vicinity of the Prairie Island nuclear plant will also interest you, since you mention the issue in your letter. After the NRC published notice on October 19, 1990, of its consideration of issuance of a materials license for spent fuel storage at Prairie Island, a notice of intervention was filed by the Prairie Island Mdewakanton Sioux Indian Community. In March 1991, a stipulation agreement was signed by the Tribe, the NRC staff, the utility, and two State of Minnesota agencies which had also filed intervention petitions. Under it, the petitioners withdrew

their intervention petitions, and the NRC and the utility agreed to furnish complete information, including notice of relevant meetings, and to perform additional analyses requested by the petitioners.

In sum, we believe that the NRC's handling of the issue of spent fuel storage at Palisades and Prairie Island has been above reproach: in its technical and environmental soundness, in its fidelity to Congressional directives, and its responsiveness to concerns of public commenters, State bodies, and affected Indian Tribes. We think that on review of the relevant documents, you will share our view.

Sincerely,

Original signed by
Robert M. Bernero

Robert M. Bernero, Director
Office of Nuclear Material
Safety and Safeguards

Enclosures:
1. Ltr to S. Offerdal
   frm F. Sturz dtd 8/4/93 w/encl.
2. Brief dated 11/3/93
3. Federal Register Notice 8/4/92

2/17/94

Dear Dr. Selin.

I'm glad the Palisades resident got your ear about my concern over the lack of seismic requirements for the spent fuel dry cask storage pad and more importantly, the foundation material. I discovered this while I was investigating an allegation from Mary Sinclair on Palisades. I've discussed this issue with Fritz Sturz, one of the authors of Part 72 the licensing requirements for the casks. Initially, it was ok as is until I requested it in writing. Enclosed is their response to this issue. It's still not addressing the generic issue of lack of seismic requirements in the regulations. It seems that Subpart E, of Part 72, covers this point quite well for storage casks that are not pre-approved. However, if you use NRC-approved casks under Subpart K the regulations are silent about the foundation material or the pad. Actually, its the consequences that might occur from an earthquake that I'm concerned about. The casks can either fall into Lake Michigan or be buried in the loose sand because of liquefaction. This event might be in the publics mind in view of what just happened in Southern California. It is apparent to me that NMSS doesn't realize the catastrophic consequences of their continued reliance on their current ideology. Please call.

Dr. Ross B. Landsman
RIII 708-829-9609

United States
NUCLEAR REGULATORY COMMISSION
Washington, D.C. 20666-0001

March 25, 1994

Dr. Mary Sinclair
5711 Summerset Drive
Midland, Michigan 48640

Dear Dr. Sinclair:

The NRC appreciates your continuing participation in NRC's regulatory process. The purpose of this letter is to respond to concerns you have raised regarding the storage of spent fuel in dry casks at the Palisades nuclear power plant. Our records on your concerns show the following:

In March 1993, in telephone calls to the offices of the Inspector General of the NRC and the Department of Energy (DOE), you made a number of allegations relating to the use of concrete and steel casks for the storage of spent fuel from the Palisades nuclear power plant. According to DOE records, the specific allegations that you raised about the casks included the following:

1. The casks were untested;
2. The manufacturer had refused to endorse use of the casks for the storage of spent fuel;
3. The NRC had failed to prepare an environmental impact statement on the action;
4. The only public hearing NRC was willing to have was without legal force;
5. The NRC, by allowing construction of casks to begin prior to the issuance of a "certificate of compliance," had failed to follow its own regulations;
6. The casks were to be inspected visually rather than continually monitored; and

7. the casks were to be located 150 years from Lake Michigan.

These seven concerns closely track issues that were raised by you and other commenters in the rulemaking on the VSC-24 cask and that the NRC has since responded to, in the NRC's final notice of rulemaking, dated April 7, 1993. That rulemaking is currently being challenged in the United States Court of Appeals for the Sixth Circuit by a number of individuals and organizations, including your own group, Don't Waste Michigan. These concerns are also similar to the issues that you raised in the NRC's February 23, 1993, workshop on dry cask storage, held in Lansing, Michigan. (Your remarks occupy pages 24 through 37 of the transcript of that meeting.) These issues are also similar to points made in your remarks (a copy of which you forwarded to NRC) to the U.S. Radioactive Waste Technical Review Board meeting, held in Dallas, Texas, on November 1-2, 1993. For our resolution of these issues, we refer you to the final notice of rulemaking.[1/]

In addition, however, the records show that during a July 15, 1993, followup telephone call with Mr. John Jacobson of NRC's Region III staff, you commented that the concrete pad underlying the free-standing casks was built on "shifting dunes." This is consistent with the comment in your Dallas remarks that the Palisades casks are "set on a storage pad in a fragile sand dune area which is geologically characterized as a high risk erosion area." In responding to this allegation, the NRC has been looking at the behavior of the pad under normal conditions, at the long-term effects of erosion, and at the possible consequences of an

---

[1] Your issue no. 1 is dealt with in issues no. 35 and 37 as listed in the final notice of rulemaking; your issue no. 2 is dealt with in issue no. 70 in the final notice; your issue no. 3 is dealt with in issue no. 61 in the final notice; your issue no. 4 is dealt with in issue no. 57 in the final notice; your issue no. 5 is dealt with in issue no. 60 of the final notice; your issue no. 6 is dealt with in rulemaking issues no. 17 and 18; and your issue no. 7 is dealt with in rulemaking issue no. 12.

earthquake that might cause motion of the sand below or around the pad.

Prior to constructing and using the casks, the licensee, Consumers Power Company, determined that the design basis earthquake of 0.2g for Palisades was bounded by the cask design basis earthquake of 0.25g. To provide increased confidence that the Palisades spent fuel storage installation has been thoroughly analyzed, the licensee has recently committed to analyze in greater detail the stability of the cask pad and foundation. On March 22, 1994, Consumers Power Company submitted a schedule for completion of additional technical efforts associated with the above concerns. A copy is enclosed.

The staff has elected to conduct an independent assessment to evaluate the licensee's analysis. Upon completion of the staff review, the results will be discussed at a public meeting to be conducted near the plant.

While we believe it is necessary to resolve these concerns, we see no present reason to believe that any undue risk is posed by the use of the casks at this time, for the following reasons:

- the casks have been evaluated to assure their safety if tipped over, as for example by an earthquake;
- the casks have also been evaluated to assure safety if all vents are blocked, as for example if the casks were to be enveloped in sand;
- any erosion of said under the pad would be a very slow process and would be readily detectable.

We wish to express appreciation for your raising concerns regarding these issues. Please contact the undersigned at (301) 504-1335 if you have any questions. Finally, because this letter discusses not only new questions but also some issues now before the United States Court of Appeals in Kelly v. Selin, No. 93-1646 et al., (6th

Circuit), we are forwarding a copy of this letter to the Court for its information.

Sincerely,

/s/ John A. Zwolinski

John A. Zwolinski, Assistant Director
for Region III Reactors
Division of Reactor Projects -
III/IV/V
Office of Nuclear Reactor Regulation

Enclosure: As Stated

SHAW, PITTMAN, POTTS & TROWBRIDGE

August 3, 1994

Mr. Leonard Green, Clerk
U.S. Court of Appeals
for the Sixth Circuit
538 U.S. Post Office
and Courthouse Building
Cincinnati, Ohio 45202

Re: Kelley v. Selin, Nos. 93-1646 et al.

Dear Mr. Green:

Consumers Power Company ("Consumers"), Intervenor/Defendant/Respondent in the above-captioned cases, hereby provides updated factual information concerning the fuel storage casks at the Palisades Nuclear Plant.

Consumers announced yesterday that it will unload and replace one of the four dry fuel storage casks at the Palisades radiographs during a review of the cask manufacturer's quality assurance program, Consumers' employees detected indications of minor flaws in welds in the steel liner of the most recently loaded cask. Although testing following cask loading did not disclose any leakage from the cask. Consumers has nevertheless another cask. Consumers' employees have examined the radiographs for all of the casks fabricated for it to date, including the other three casks containing spent fuel, and have found all other welds to be acceptable.

Although this corrective action is not material to the licensing issues that are presented in the above-captioned appeal, it has some bearing on the question of the reversibility of the cask-loading process, a matter raised in connection with earlier stay requests and most recently discussed in the parties' filings regarding expedited

oral argument. Consumers therefore deems it appropriate to inform the Court of this development.

Three copies of this letter are enclosed for distribution to the panel of this Court assigned to the appeal.

Respectfully submitted.

/s/ Michael Carvin

Michael A. Carvin
Counsel for
Consumers Power Company

cc: Service List

UNITED STATES
NUCLEAR REGULATORY COMMISSION
WASHINGTON, D.C.
January 4, 1995

Dr. Mary P. Sinclair
5711 Summerset Drive
Midland, Michigan 48640

SUBJECT: RESPONSE TO NOVEMBER 6, 1994 LETTER REGARDING PALISADES DRY CASK STORAGE

Dear Dr. Sinclair:

Thank you for your letter dated November 6, 1994, regarding dry cask storage at the Palisades nuclear plant. In your letter, you refer to a letter from the NRC to Consumers Power Company (CPCo) dated October 26, 1994. In that letter, the staff referred to the progress that CPCo had made in loading Multi-assembly Sealed Basket (MSB) Nos. 6 through 8 and in enhancing the existing unloading procedures. Our intent with this statement was to simply identify the fact that MSB Nos. 6, 7, and 8 had successfully been loaded, and that enhancements to the existing cask unload procedure were continuing. You also asked whether CPCo had found a way to load the cask without using steel shims. The current VSC-24 cask design provides, as a fabrication detail, for steel shims used in loading the cask. The shims serve as a backing ring for the shield lid welds and to position the shield lid in the loading process. CPCo has not informed the staff of any new developments in loading the casks without using the steel shims.

Your letter also correctly points out that a procedure is required to be in place to unload the casks should the necessity arise. In addition, you posed the following questions:

1. Did the staff check for the adequacy of this report for the unloading process before the certification of the cask was approved? Is there a staff report on this?

The Certificate of Compliance requires that a procedure be developed for cask unloading, assuming damaged fuel. The Certificate also requires that precautions be taken against the potential for the presence of oxidized fuel and to prevent radiological exposure to personnel during the unloading operation. The staff did not check the adequacy of CPCo's unloading procedure before the Certificate of Compliance was issued, because the Certificate of Compliance is issued to the cask vendor, not the CPCo. The NRC's responsibility in issuing a Certificate of Compliance is to evaluate and document the adequacy of a cask for storage of spent fuel. Once a utility decides to utilize the cask that has been approved, it is required to meet the criteria specified in the Certificate of Compliance and notify the NRC of its intent to use the cask. CPCo had a procedure in place for unloading the spent fuel storage casks in May 1993, prior to issuance of the Certificate of Compliance. The staff is not required and does not have the resources to review every procedure developed to meet either the Part 50 or Part 72 license.

2. If there are serious questions that have now come to light about unloading procedures for this cask, is it prudent for the NRC to allow continued loading of these casks until Cask No. 4 has been successfully unloaded?

   There are no serious questions regarding the unloading procedure. CPCo is enhancing its existing procedure to take advantage of new cutting techniques that have become available, as well as further improvements in reducing personnel exposure. In a letter to the NRC dated December 29, 1994, CPCo certified that the current unload procedure is adequate for unloading the casks and is in compliance with the Certificate of Compliance. There is no regulatory basis for precluding CPCo from loading additional casks. The flaws existing in Cask No. 4 occurred during manufacturing of that particular cask and were not related to the loading of the cask.

Therefore, the staff sees no impediment to continued loading of additional casks.

3. Have any other casks that the NRC has certified been unloaded for any reason? If so, what type are they?

   The staff is not aware of any NRC-certified storage casks which have been unloaded. However, the NRC-certified transportation casks have been routinely unloaded in actual practice. The transportation casks are metal casks which are designed and analyzed based on similar criteria and load requirements as storage casks.

4. What techniques have been devised to control the steam flash that is the result of introducing 100°F water to 400°F fuel surfaces during unloading of the VSC-24 cask, as was mentioned at the August 25 meeting? Is this problem common to all the casks during unloading that the NRC has certified?

   The thermal and pressure design criteria set forth in the vendor's Safety Analysis Report and the staff's Safety Evaluation Report should be maintained during the unloading process. Therefore, for MSB cooling, the supply water and the MSB vent path discharge should be at a controlled rate; andy MSB pressure transient, steam accumulation, and temperature rise will be considered in the unloading procedures.

   CPCo will submit the completed unloading procedures to the staff for review. This review will include an evaluation of the effects of reintroducing relatively cold water onto the fuel stored in the cask.

Your letter also questioned the staff's intent to hold a meeting in our headquarters offices regarding the unloading procedures. The staff intends to hold a technical meeting with CPCo in Rockville, Maryland, once the unloading procedures are completed and the staff has reviewed them. We envision this meeting to be highly technical in nature. We, therefore, intend to hold a public meeting near the Palisades plant to discuss the unloading procedures with

interested members of the public prior to making any decisions regarding the adequacy of the unloading procedures. No dates have been set at this time for either of these meetings. Meeting notices will be issued once dates have been agreed upon.

If you have any further questions regarding this response, please contact Janet Kennedy at 301-504-3267.

Sincerely,

ORIGINAL SIGNED BY KEVIN CONNAUGHTON
John N Hannon, Director
Project Directorate III-1
Division of Reactor Projects - III/IV
Office of Nuclear Reactor Regulation

The *New York Times, Page 1*
Wednesday, February 15, 1995

Utilities Filling Void in Storing Nuclear Waste
By KEITH SCHNEIDER

Special to The New York Times

COVERT, Mich., Feb. 9 - For the foreseeable future, more than 70 communities near nuclear generating plants will become repositories for spent nuclear fuel, the most radioactive of all atomic wastes, without any public hearings or environmental studies of the sites.

Utilities have no choice but to build de facto permanent repositories near their plants, because after decades of searching for a centralized nuclear waste site, the United States is still at least 15 years away from a solution and has found nowhere else to store the roughly 30,000 tons that have already accumulated.

In a little-noticed ruling in January, the United States Court of Appeals for the Sixth Circuit, in Cincinnati, cleared the way for utilities to store radioactive wastes indefinitely at their nuclear power plants without holding formal public hearings or conducting any environmental assessment. Three weeks later, on Feb. 1, members of the Mescalero Apache tribe in New Mexico turned down a proposal to build a national high-level nuclear waste storage center on their reservation.

Both supporters and critics of nuclear power agree that hose two decisions mean that it now much easier, and even necessary, for utilities to build their own storage sites for atomic wastes. Despite having spent nearly $2 billion studying a potential repository at Yucca Mountain in Nevada, the Department of Energy still does not know is the site is suitable; even if it is, the earliest that a permanent repository could open there would be in the year 2010.

Here at the Palisades Nuclear Plant, an hour southwest of Grand Rapids, nine 16-foot-tall concrete and steel casks are being erected in a monument to one of the 20th century's enduring technical and political failures. The casks, each of which holds 30 tons of spent nuclear fuel and cost $500,000, stand side by side on a table-flat concrete pad a stone's throw from Lake Michigan. How long the casks and their contents will remain here is anybody's guess.

This was never envisioned in the 1950's and early 60's, when the Government promoted the development of immense electric generating plants powered by atomic energy. Anticipating that the Government would either allow spent fuel to be recycle or would construct a permanent repository, utilities generally built small water pools to store their wastes temporarily.

But the recycling idea was barred in the late 1970's by President Jimmy Carter, who feared it would produce huge quantities of plutonium capable of being used in nuclear bombs. And efforts over the last four decades to establish Government owned permanent repositories in Kansas, Washington State, Texas and Nevada have failed.

Now utilities that own the nation's 109 operating reactors and manage several other that have been closed are studying how to move spent nuclear fuel from bulging indoor storage pools to outdoor concrete casks. The Nuclear Regulatory Commission has already received applications from utilities in Arkansas, California, Ohio and Pennsylvania for permission to build storage sites like this one, and more applications are expected, commission officials say.

Palisades officials say they have no choice. Roughly 18 percent of the energy generated each year by the plant's owner, Consumers Power, a subsidiary of the CMS Energy Company, is produced by the Palisades reactor. Nationwide, about 21 percent of all electricity is generated by nuclear power.

As long as the reactors operate they will produce high-level radioactive waste, adding to the 30,000 tons already accumulated since the 1960's, according to the Department of Energy. By the second decade of the 21st century there will be 55,000 more tons of spent nuclear fuel, department officials estimates.

"We're out of space in our pool, and we looked at several other options for storing wastes," said Mark Savage, the Palisades spokesman. "Dry fuel storage in casks was the option we chose, and it's the safest and simplest component we have at this plant. There are no moving parts and nothing to break. It sits on a pad and releases heat."

The cask design chosen by Consumers Power is essentially a heavy steel barrel 1 inch thick inside a reinforced concrete shell that is 29 inches thick. During loading, the steel barrel is lowered into the storage pool, bundles of spent fuel rods are placed in the barrel, a thick top is welded in place and the entire assembly is then lifted out of the pool and slipped into the shell. The 130 tons of steel and concrete cannot contain all the radiation; a person hugging the cask for an hour would receive half the dose of a chest X-ray.

Four other nuclear power plants in Maryland, South Carolina and Virginia already store their wastes above ground in casks. What distinguishes the Palisades project form the others is the relative ease with which Consumers Power established it. The other sites had all required extensive environmental evaluations and full public hearings.

In 1982, as part of the Nuclear Waste Policy Act, Congress foresaw the impending storage pool problem and encouraged utilities to build alternate nuclear waste sites. In 1990 the Bush Administration put the policy into effect by writing a rule that said the new storage sites could be built without formal public hearings or an environmental study, as long as utilities used casks that had been certified and approved by the Nuclear Regulatory Commission.

Two years ago, immediately after the commission approved the Palisades cask design, a coalition of anti-nuclear groups and Frank J. Kelley, the Michigan Attorney General, sued the Government. Mr. Kelley argued that cask storage represented a potentially dangerous change in the nation's policy for managing atomic wastes that merited much more public involvement and debate.

During oral arguments last October before the appeals court, Mr. Kelley produced a memorandum from Dr. Ross B Landsman, an N.R.C. soils expert, warning Ivan Selin, the commission's chairman, that the Palisades waste site was situated amid unstable said dunes, was within 150 yards of Lake Michigan and was vulnerable to earthquakes. He urged the agency to conduct a full environmental assessment to avoid what he said could be "catastrophic consequences."

There have also been concerns about the casks themselves. Last summer Consumers Power announced that a review of X-rays had identified "crack-like indications" and several others flaws in the welds of the fourth cask, which was loaded in July.

Kurt Haas, the director of plant safety and licensing, said in an interview that the flaws did not represent a threat to the structural integrity of the casks. nevertheless, he said, the senior managers of Consumers Power decided that the cask must be unloaded and the weld repaired.

Mr. Haas described the procedure a relatively straightforward. However, it would be the first time that a cask full of high-level radioactive wastes has been unloaded.

According to an internal company memorandum obtained by Mary Sinclair, a 76 year old longtime nuclear opponent form Midland, Mich., who is a plaintiff in the suit decided by the appellate court, unloading the cask will be no simple feat.

Perhaps the most difficult problem is controlling the radioactive steam that will billow up when the steel covers are removed and the cold water in the storage pool strikes the hot unclear fuel rods.

Mr. Haas said that the cracks do not present an emergency, and that the company is taking its time reviewing its procedures. But Mrs. Sinclair argues that the problem with cask No. 4 is an example of why the public should be more involved. She said questions about the safety of the casks and the procedures for opening them had been largely ignored by the Government and the utility.

In court, the nuclear commission, with the help of the Justice Department and the utility industry, defended the Bush Administration's 1990 rule and the cask storage system. The Clinton Administration argued that the regulation limiting public hearings responded to Congressional directives and was lawful.

"Congress realized in the 1980's that the spent fuel was accumulating in pools and there would be no place to put the wastes," said John F. Cordes, the nuclear commission's solicitor. "It became apparent that dry cask storage was the safest alternative."

On Jan. 11, a three-judge panel of the Sixth Circuit unanimously ruled that the Government's action to encourage construction of above ground nuclear waste storage sites was valid and lawful.

Mr. Kelley declined to be interviewed, saying through a spokesman that he had not decided whether to appeal the case to the Supreme Court.

Mrs. Sinclair, the head of Don't Waste Michigan, an anti-nuclear organization, said here group would appeal to the nuclear commission to overturn the 1990 rule.

"The issue is whether the public has the right to be involved in how we are going to dispose of deadly poisons," Mrs. Sinclair said. "It's incredible The Government now has a procedure for building these waste sites in which they don't have to notify the public, local authorities or anything. They can just build them and load them."

Supreme Court, U.S.
FILED
MAY 12 1995
OFFICE OF THE CLERK

No. 94-1702

In The

Supreme Court of the United States

October Term, 1994

FRANK J. KELLEY, Attorney General of the State of Michigan on behalf of the Citizens of the State of Michigan; HERBERT P. READ; NORMAN W. PERMAN; SUSAN KIMMELMAN; THE LAKE MICHIGAN FEDERATION; and DON'T WASTE MICHIGAN,

Petitioners,

v.

IVAN SELIN; JAMES R. CURTISS; E. GAIL DEPLANQUE; FORREST J. REMICK; KENNETH C. ROGERS; UNITED STATES NUCLEAR REGULATORY COMMISSION; and UNITED STATES OF AMERICA,

Respondents,

CONSUMERS POWER COMPANY,

Intervenor/Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

BRIEF IN OPPOSITION

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COUNTERSTATEMENT OF QUESTIONS PRESENTED

1. Whether the Court of Appeals for the Sixth Circuit correctly determined, consistently with the Administrative Orders Review Act, 28 U.S.C. § 2344, and with applicable precedent, that to the extent petitioners were challenging the Nuclear Regulatory Commission's (NRC) 1990 regulation establishing a general license scheme pertaining to spent fuel storage casks, such a challenge was untimely because it was not filed within 60 days of the promulgation of the 1990 regulation, and, if not, whether petitioners were thereby prevented from having any of their substantive arguments considered and decided by the Court of Appeals.

2. Whether the Court of Appeals correctly determined, consistently with applicable precedent under Section 189 of the Atomic Energy Act, 42 U.S.C. § 2239, Section 4 of the Administrative Procedure Act, 5 U.S.C. § 553, and Sections 133 and 218(a) of the Nuclear Waste Policy Act, 42 U.S.C. §§ 10153 and 10198(a), that the NRC was not required to provide an "on-the-record" adjudicatory hearing in connection with an informal rulemaking that added one spent fuel storage cask to the existing list of approved casks in NRC's regulations at 10 C.F.R. Part 72, Subpart K.

3. Whether the Court of Appeals correctly determined, consistently with applicable precedent under the National Environmental Policy Act, 42 U.S.C. §§ 4321-4370 (NEPA), that the NRC was not required, under NEPA and 42 U.S.C. §§ 10153 and 10198(a), to conduct a "site-specific" environmental review or analysis in connection with an informal rulemaking that added one cask to the existing list of approved casks in NRC's regulations at 10 C.F.R. Part 72, Subpart K.

RULE 29.1

Respondent Consumers Power Company is a wholly-owned subsidiary of CMS Energy Corporation.

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OPINIONS BELOW

On January 11, 1995, the United States Court of Appeals for the Sixth Circuit denied a challenge to the 1993 rulemaking that added the VSC-24 ventilated storage cask to the list of casks, in 10 C.F.R. Part 72, Subpart K, approved by the Nuclear Regulatory Commission (NRC or Commission) for temporary storage of spent nuclear fuel at licensed reactor sites. *Kelley v. Selin*, 42 F.3d 1501 (6th Cir. 1995) (Pet. at 1a-40a). The 1990 NRC rulemaking cited by petitioners (Pet. at 1) was not on review before the Court below.

STATUTORY AND REGULATORY PROVISIONS INVOLVED

In addition to the statutory and regulatory provisions cited by petitioners, 42 U.S.C. § 10153 (Nuclear Waste Policy Act) (App. 1) is also pertinent to this case. The full text of that statutory provision is included in the Appendix.

COUNTERSTATEMENT OF THE CASE

Petitioners' Statement of the Case omits and misstates important information concerning the factual and legal background and context of this case.

1. National Policy Concerning Spent Nuclear Fuel Disposal

Under the Nuclear Waste Policy Act of 1982, as amended, 42 U.S.C. § 10101 *et seq.* (NWPA), the Department of Energy is required to construct and license a federal repository for the permanent disposal of spent nuclear fuel from commercial nuclear power plants. Until this repository becomes operational, utilities that produce spent fuel are responsible for its storage, preferably at reactor sites. 42 U.S.C. § 10151(a)(1).

To encourage on-site storage, Congress directed the Secretary of Energy to establish a demonstration program

for dry storage of spent fuel at reactor sites to develop technologies that the NRC

> may, by rule, approve for use at the sites of civilian nuclear power reactors without, to the maximum extent practicable, the need for additional site-specific approvals by the Commission.

42 U.S.C. § 10198(a) (Pet. at 57a-58a). The NWPA further directed the NRC to establish licensing procedures for any technology approved under the demonstration program mandated by 42 U.S.C. § 10198(a). 42 U.S.C. § 10153 (App. 1)

2. NRC's 1990 Rulemaking to Add Subpart K to 10 C.F.R. Part 72

Pursuant to this directive, the NRC promulgated 10 C.F.R. Part 72, Subpart K by informal notice and comment rulemaking in 1990 (55 Fed. Reg. 29,181 (1990); Pet. at 59a-66a). That regulation grants to holders of licenses of nuclear power reactors a "general license," *i.e.*, a license not requiring a specific application for approval and not requiring a hearing opportunity, to store, in pre-approved storage casks, spent fuel irradiated at that plant provided certain conditions are met. *See* Pet. at 5 n.3. The rule's rationale is that the approved cask designs will have been extensively reviewed to assure their suitability for use at all nuclear power reactor sites meeting certain specified criteria, those sites having been thoroughly analyzed as part of the reactor licensing process, during which an adjudicatory hearing opportunity would have been afforded. App. 69a. Petitioners brought no judicial challenge to that rulemaking.

3. Spent Fuel Storage at the Palisades Plant

Respondent Consumers Power Company (Consumers) is licensed by the NRC to operate the Palisades Plant, located on the shore of Lake Michigan near Covert,

Michigan. Many early nuclear power plants, including the Palisades Plant, were not designed to accommodate spent fuel generated over the entire operating life of the plant. For power generation to continue at Palisades, additional spent fuel storage was required in 1993 because there was no longer any additional space in the spent fuel pool.[1] Absent some additional storage capability, the only alternative was to permanently shut down the plant, 14 years before the end of the current license term.

After studying this problem, Consumers selected the "VSC-24" dry storage cask for additional storage of spent fuel outside of the spent fuel pool.[2] This storage system utilizes massive concrete and steel storage casks in which the spent fuel elements are placed. Each cask is sixteen feet tall, 29 inches thick, eleven feet in diameter, and weighs 130.1 tons when loaded. After loading, the concrete container is transported to a 2-3 foot thick concrete pad located on the plant site near the Auxiliary Building which houses the current spent fuel pool, but farther from Lake Michigan than the Auxiliary Building. The cask is ventilated by internal air flow paths which allow decay heat from the spent fuel to be removed by natural circulation around the metal basket wall. The system is

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[1] Contrary to petitioners' implication (Pet. at 3), the storage capacity of the Palisades spent fuel pool has been maximized, and there are no other technically feasible means of expanding storage capacity in the spent fuel pool.

[2] The selection of dry cask above-ground storage was consistent with Michigan law. In 1989, the Michigan Legislature endorsed above-ground spent fuel storage "at or near" nuclear power generating facilities, if approved by the NRC. Mich. Comp. Laws § 325.491 (1989); *Kelley*, 42 F.3d at 1505 n.1. Consumers also received a permit from the Michigan Department of Natural Resources (DNR) for construction of the concrete pad on which the storage casks would be located. DNR Permit No. 90-VB-100-SC.

designed to withstand tornadoes, fire, extreme temperature, and impact from projectiles (*e.g.*, a speeding car).

In March 1990, Consumers submitted an application to the NRC under 10 C.F.R. Part 72 for a site-specific license to use the VSC-24 casks at Palisades. At the time, the Subpart K general license had not been issued by the NRC, and site-specific licensing was the only option available to Consumers. However, in July 1990, the NRC finalized the Subpart K rulemaking, and Consumers withdrew the specific license application, opting to utilize the general license. At that time, the VSC-24 cask was not on the list of approved casks for use under the general license, but the cask vendor had begun the NRC approval process.

It was no secret that Consumers sought to take advantage of the Subpart K general license scheme for the VSC-24 cask at Palisades. Consumers advised the NRC by letter that

> We believe the need for a site-specific proceeding is mooted by adoption of the new rule. Accordingly, this is to notify you that the Company hereby withdraws its March 9, 1990 application, and that it intends to utilize the general license granted in new Subpart K when it is able to satisfy the conditions of the general license. By copy of this letter, we are so advising all those whose intervention petitions we have received.

(App. 2-3).[3] A copy of this letter was placed in the NRC's public document rooms and sent by Consumers to all petitioners who requested a hearing on Consumers' application. Therefore, petitioners Kelley (who has, as Michigan Attorney General, closely followed matters

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[3] This letter is not part of the administrative record on review. Consumers cites it only to correct the erroneous impression left by petitioners that they had no reason to believe the 1990 rulemaking would apply to them.

relating to the Palisades Plant for years) and Don't Waste Michigan (which was on the service list for NRC's notice that the Part 72 application had been withdrawn) had every reason to know of Consumers' intent to "utilize the general license" and to believe that the 1990 regulations would directly affect them. Thus, petitioners' claim that "none of the Petitioners had reason, at that time, to challenge the 1990 regulations" (Pet. at 5), is false.

4. Addition of the VSC-24 Cask to the List of Approved Casks in Subpart K

On April 7, 1993, the NRC published a final rule that added the VSC-24 cask to the list of casks approved for use at U.S. reactor sites under certain conditions. 58 Fed. Reg. 17,948 (1993). Publication of the rule followed a 75-day comment period, 57 Fed. Reg. 28,645 (1992), which was later extended by 30 days, 58 Fed. Reg. 5,301 (1993), as well as an informal public meeting. The rule was supported by a lengthy Federal Register notice that provided extensive technical and legal responses to issues raised in public comments on the rule, including comments by petitioners.

The final rule was also supported by an Environmental Assessment (EA) and finding of no significant impact. (6th Cir. J.A. 741) The EA considered the effects of operation of the VSC-24 casks, and concluded that no change in environmental impact was anticipated because the rulemaking did not change existing NRC safety and environmental requirements for spent fuel storage and because cask users would still have to meet those requirements. The EA was explicitly tiered, *see* 40 C.F.R. § 1508.28, on numerous prior environmental analyses relating to spent fuel storage. *See Kelley*, 42 F.3d at 1519-20.

In preparation for spent fuel storage in the VSC-24 casks at Palisades, Consumers reviewed the Palisades Security and Emergency Plans and made changes to those

plans to address the inclusion of the storage cask installation within the Palisades Protected Area, pursuant to 10 C.F.R. §§ 50.54(p) and (q). Neither change necessitated an amendment to the operating license for the Palisades Plant. Changes to these plans are routine and, pursuant to NRC regulations, are routinely made by power reactor licensees without prior NRC approval. Petitioners did not seek to challenge either of those changes before the NRC.

5. Proceedings Below

On May 4, 1993, petitioners Kelley, Lake Michigan Federation (LMF), Read, Perman, and Kimmelman filed an action in the U.S. District Court for the Western District of Michigan seeking an injunction against the implementation of the 1993 VSC-24 rulemaking. Consumers was admitted to the suit as an intervenor-defendant. On May 10, the district court ruled that it lacked jurisdiction over the lawsuit and transferred the case to the Sixth Circuit. Pet. at 41a-52a; 53a-54a.

Petitioners Kelley, LMF, Read, Perman, and Kimmelman appealed the District Court's decision. Petitioners Kelley, LMF, and Don't Waste Michigan also filed a petition for review of the VSC-24 rulemaking in the Sixth Circuit on June 4, 1993; petitioners Kelley and LMF filed a second petition for review of that same rulemaking on July 9, 1993. Consumers was allowed to intervene as a respondent with respect to both petitions.

Petitioners argued in the case below that (1) an amendment to the Palisades operating license was required, which could not be granted without an adjudicatory hearing opportunity, although petitioners could point to no provision in the license that needed amending; (2) the NWPA did not authorize the elimination of such "hearing" rights; (3) certain routine "site-specific" decisions at the Palisades Plant also triggered adjudicatory hearing rights; and (4) a "site-specific" environmental analysis was required because of the decision to use

the VSC-24 cask at the Palisades Plant. Petitioners' challenge to the 1990 "framework of Subpart K as applied concretely to them in 1993" (Pet. at 8) was confined to a footnote in their brief, in which petitioners claimed that they could challenge "the validity of certain aspects of the 1990 rule." Petitioners did not name one specific aspect of the 1990 rule that they sought to challenge.

6. Post-Filing Issues

Petitioners incorrectly assert that "extraordinary events" occurring after briefing have undermined the NRC's legal position. Pet. at 9. These "events" were completely irrelevant to the disposition of the legal issues presented in the case below. The first so-called "event" was a letter from an employee of the U.S. Environmental Protection Agency (EPA) who requested environmental documentation concerning the use of the VSC-24 at Palisades, and claimed that a site-specific environmental analysis was required (Pet. at 66a-67a). This EPA employee was apparently unaware that copies of the relevant environmental documentation concerning the VSC-24 cask had been sent to his office six months previously. *See* Pet. at 68a-71a. The NRC wrote a letter to the EPA employee that explained the NRC's comprehensive approach to satisfying its responsibilities under NEPA in this case. *Id.* The EPA employee was apparently satisfied by the NRC's response, since he took no further action.

The second so-called "event" concerned an analysis by Consumers and an independent review by the NRC of the stability of the soil underneath the concrete storage pad on which the casks are placed at Palisades, in response to a concern expressed in a handwritten note from a member of the NRC's technical staff. Both reviews concluded that the soil underneath the storage pad would support the pad in the event of any earthquake or flood that is conceivable for the Palisades site. (App. 4-6)

Finally, petitioners cite Consumers' identification of flaws in welds in a steel basket of one of the casks that

had been loaded with spent fuel. Pet. at 11. After identifying the flaws, Consumers concluded, and NRC concurred, that they posed no safety issue. Nonetheless, Consumers has decided, as a conservative measure, that it will unload that cask and reload it later this year. There is no basis for petitioners' suggestion that the cask has not been unloaded because it is unsafe to do so. Indeed, the source cited by petitioners, a letter from the NRC, stated exactly the *opposite* of petitioners' conclusion: "[t]here are no serious questions regarding the unloading procedure." Pet. at 80a.[4] In any event, none of these matters required an amendment to the Palisades operating license. These issues were properly ignored by the Sixth Circuit as irrelevant to the legal issues before the Court.

7. The Sixth Circuit's Decision

A panel of the Sixth Circuit unanimously rejected petitioners' arguments and denied the petitions for review.[5] The Court ruled that it was within the NRC's discretion to select rulemaking as the procedural vehicle

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[4] We note that petitioners moved the Sixth Circuit to supplement the administrative record with some of the documents concerning post-briefing issues referenced by petitioners that were clearly not part of the administrative record on review (Pet. at 66a-67a, 72a, 73a-76a). This motion was denied, a decision that petitioners do not challenge. In addition, petitioners have included a newspaper article in the appendix (Pet. at 84a-88a). This article should be disregarded or stricken because it is outside the administrative record, *Camp v. Pitts*, 411 U.S. 138 (1973), it contains unreliable and self-serving hearsay, *see Mayor of Philadelphia v. Educational Equality League*, 415 U.S. 605, 618 n.19 (1974), and is in any event irrelevant to this case.

[5] The Sixth Circuit also rejected Consumers' argument that none of the petitioners had standing to challenge the 1993 VSC-24 cask rulemaking, holding that at least some of the petitioners did in fact have standing. *Kelley*, 42 F.3d at 1508-10.

for approving spent fuel storage technologies, and the NRC afforded the public "an extensive opportunity to comment" on the proposed rulemaking. *Kelley*, 42 F.3d at 1512. The Court also upheld the NRC's technical determinations that proposed changes to the Palisades Emergency and Security Plans did not require a license amendment. *Id.* at 1517.

The Court further found that no site-specific NEPA review was required, holding that the EA prepared by the NRC was sufficient, and that it was properly "tiered" on a series of previously issued environmental analyses on dry cask storage of spent nuclear fuel. *Id.* at 1519. The Court concluded by noting that "the Congressional policy embodied in the NWPA was to provide to the NRC a basis to approve various dry storage technologies for use at civilian nuclear power reactors without site-specific hearings." *Id.* at 1521. The Court characterized petitioners' claims as an attack on the Congressional policy choice to encourage licensing of spent nuclear fuel storage technologies by rulemaking. *Id.*

The Court rejected, in a footnote, the suggestion that petitioners could properly challenge the 1990 Subpart K rulemaking, stating that petitioners should have asserted their claims within the 60-day period prescribed by the Administrative Orders Review Act (commonly known as the Hobbs Act), 28 U.S.C. § 2344. *Kelley*, 42 F.3d at 1515 n.3. The Court nevertheless addressed the merits of each argument made by petitioners.

REASONS FOR DENYING THE WRIT

Petitioners seek certiorari in this case on three primary grounds. First, petitioners assert that the Sixth Circuit improperly concluded that, if petitioners were actually challenging the NRC's 1990 Subpart K rulemaking, their challenge was untimely under the Hobbs Act. Pet. at 13-20. Second, petitioners seek review to determine whether the Sixth Circuit improperly allowed the NRC, acting pursuant to the NWPA, to add the VSC-24

cask to the list of approved spent fuel storage casks without affording petitioners an opportunity for an adjudicatory hearing under the AEA. *Id.* at 20-26. Finally, petitioners claim that this Court's intervention is needed to correct the Sixth Circuit's error in allowing the NRC to approve the VSC-24 cask by rulemaking without performing a "site-specific" environmental review pursuant to NEPA. *Id.* at 26-29. Despite petitioners' strained attempts, they have failed to raise a certworthy issue.

While petitioners claim that the issues they raise "implicate[ ] critically important questions of law and public policy," Pet. at 12, this is a routine administrative law case in which the Sixth Circuit engaged in a straightforward analysis of relevant statutes and correctly applied well-settled precedent. Indeed, as to the merits of the dispute that is at the heart of this case – *i.e.*, whether the NRC may approve the addition of the VSC-24 casks for use, under the NRC's general license, at nuclear power plant sites – petitioners have offered nothing which would call the Sixth Circuit's analysis or conclusions into question. As to this dispositive legal issue, petitioners have not even alleged either a split in the circuits or a conflict with this Court's precedent. Apparently recognizing this fatal deficiency, petitioners purport to discern, in the footnotes and minutiae of the Sixth Circuit's opinion, circuit splits or conflicts with the decisions of this Court. Even if such circuit splits or conflicts with precedent actually exist – which they do not – this case presents an inappropriate vehicle for resolving such disagreements because their resolution would not change the Sixth Circuit's ultimate conclusion rejecting petitioners' challenge to the VSC-24 cask rulemaking.

In addition, because the Sixth Circuit applied settled administrative law precedent (the validity of which petitioners do not attempt to dispute), nearly every argument that petitioners make is tied to their disagreement with the NRC's resolution of fact-specific matters and technical issues pertaining to the VSC-24 cask rulemaking. Such

matters, however, are of the type that are correctly left, under this Court's decisions, to the informed discretion of an expert agency. More importantly, these matters implicate no far-reaching or generally applicable principles of law. Thus, the petition, stripped of its rhetoric, does not call for the resolution of any important legal principles which are of general applicability or about which there is either a split in the circuits or a conflict with the precedent of this Court.[6]

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[6] Consumers argued before the Sixth Circuit that none of the petitioners had standing to advance their arguments before that Court. The Sixth Circuit disagreed, holding that petitioners Read, Perman, and Kimmelman (the "landowners") had alleged sufficient injury to establish standing. *Kelly*, 42 F.3d at 1508-10. Assuming *arguendo* that the Sixth Circuit's standing analysis was correct for that Court, it is even clearer that none of the petitioners has standing to advance their claims in *this* Court. *See, e.g., Gladstone, Realtors v. Village of Bellwood*, 441 U.S. 91, 115 (1979) (the issue of standing may be raised at any time). The landowners were parties to only two of the four dockets that were consolidated before the Sixth Circuit: Docket No. 93-1710 (the appeal from the district court's decision that it lacked jurisdiction over petitioners' challenge) and 93-1646 (the case transferred from the district court to the Court of Appeals). The Sixth Circuit rejected Consumers' argument that petitioners had abandoned their appeal from the district court's jurisdictional decision. While Consumers believes that the Sixth Circuit erred in this regard, we note that the Sixth Circuit affirmed the district court's conclusion that it lacked jurisdiction, *Kelley*, 42 F.3d at 1509 n.2, and that petitioners have not objected to that decision in this Court. Thus, regardless of whether petitioners' appeal on the jurisdictional question was abandoned before the Sixth Circuit, it has surely been abandoned here. Moreover, the claims raised by petitioners in both 93-1710 and 93-1646 are moot. The only relief sought in those actions was an order enjoining the NRC from taking "further steps" to permit the loading of the casks at Palisades. Because the VSC-24 rule was allowed to become final and effective, however, there simply are no "further steps" that the NRC has to take to permit loading. For this

I. PETITIONERS HAVE NOT RAISED A CERTWORTHY ISSUE WITH RESPECT TO THE SIXTH CIRCUIT'S DETERMINATION THAT PETITIONERS MAY NOT CHALLENGE THE 1990 SUBPART K RULEMAKING.

The issue that petitioners believe is most worthy of this Court's review was addressed in a footnote in the Sixth Circuit's decision. In the course of painstakingly addressing all of petitioners' arguments, the Sixth Circuit observed that some of those arguments "appear to claim that portions of the NRC's 1990 [Subpart K] rulemaking are invalid." *Kelley*, 42 F.3d at 1515 n.3. The Sixth Circuit indicated, however, that it could not reach any such claim, because petitioners should have asserted such a claim within sixty days following the promulgation of the 1990 regulation, as required by the Hobbs Act. *Id.* (citing 28 U.S.C. § 2344). Petitioners claim that the Sixth Circuit erred in failing to recognize (1) that any challenge within the Hobbs Act's 60-day review period may not have been ripe, and (2) that review of the 1990 regulation in connection with their timely challenge to the 1993 VSC-24 cask rulemaking should have been allowed under the so-

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reason, there is no basis for a claim of standing by the landowners. This leaves only the remaining parties, Kelley, LMF, and Don't Waste Michigan, as petitioners. Petitioner Kelley bases his standing on his authority to act on behalf of the people of Michigan to protect their interests – *i.e.*, a *parens patriae* argument. It is well settled, however, that a state cannot assert *parens patriae* standing in a suit against the federal government. *See Alfred L. Snapp & Son, Inc. v. Puerto Rico*, 458 U.S. 592, 610 n.16 (1982); *Massachusetts v. Mellon*, 262 U.S. 447, 485-86 (1923). As for Don't Waste Michigan and LMF, neither of these organizations has satisfied this Court's requirements for demonstrating that they, or any identified members they may have, have any concrete interest that could be affected in this action. *See Lujan v. National Wildlife Fed'n*, 497 U.S. 871 (1990).

called "reopener" doctrine. Pet. at 13-20. Petitioners' attempt to elevate a straightforward discussion of settled law in a footnote into an important legal error is unavailing.

1. Significantly, petitioners nowhere attempt to explain how they were harmed by the Sixth Circuit's analysis of whether they could challenge the 1990 Subpart K rulemaking. Nor do they even attempt to demonstrate how that analysis affected the outcome of their challenge to the 1993 rulemaking This omission is not accidental. Petitioners *cannot* explain how the Sixth Circuit's analysis of this Hobbs Act issue changed the result of this case because the Sixth Circuit's analysis of that issue did not cause it to overlook any of petitioners' arguments.

The simple fact is that the Sixth Circuit considered, and painstakingly addressed, every single argument raised by petitioners in their appellate briefs. Petitioners mounted a broad-based attack on the NRC's authority, under the AEA and NEPA, to generically approve, without site-specific adjudicatory hearings and environmental reviews, spent fuel storage casks under the general license scheme. The Sixth Circuit considered and rejected this attack in its entirety and did not fail to address any aspect of it because it fell within the scope of the 1990 rule, as opposed to the 1993 rule. Indeed, petitioners themselves recognized that this artificial distinction between the 1990 and 1993 rule was of no moment since they maintained below that "[p]etitioners' argument is not in any case contingent on any challenge to the 1990 rule." Reply Brief at 16. Petitioners, therefore, can point to no prejudice that they may have suffered as a result of the Sixth Circuit's observation that any challenge to the 1990 rulemaking would be untimely. Petitioners are essentially seeking a purely advisory opinion on this issue. Even if their arguments are correct, the most that petitioners could hope to achieve is the removal of the offending footnote from the court's opinion. Clearly, this

case presents an unacceptable vehicle for the consideration of the issues raised by petitioners.

2. Petitioners characterize their dispute with the Sixth Circuit's analysis of their ability to challenge the 1990 Subpart K rulemaking as raising a question under the ripeness doctrine. Pet. at 14-18. Thus, petitioners suggest that the Sixth Circuit's analysis conflicts with this Court's decisions in *Lujan v. National Wildlife Fed'n*, 497 U.S. 871 (1990) and *Reno v. Catholic Social Servs.*, 113 S. Ct. 2485 (1993), because those cases compel the conclusion that a timely challenge to the 1990 rulemaking would have failed on ripeness grounds. Pet. at 14-18.

Notwithstanding petitioners' exertions in this regard, however, this is *not* a ripeness case. No party has argued, and the Sixth Circuit has not held, that petitioners' lawsuit was not ripe. The ripeness doctrine is an analytical tool for determining whether a lawsuit challenging agency action has been filed too *early*. *See Abbott Labs. v. Gardner*, 387 U.S. 136 (1967). Petitioners' problem in this case, however, is that, to the extent petitioners wish to challenge the 1990 Subpart K rulemaking, they filed their petition several years too *late*.

Petitioners argue that, under *Lujan* and *Reno*, they *may* have faced a ripeness obstacle *if* they had sought to challenge the 1990 Subpart K rulemaking.[7] It is thus apparent that what petitioners desire this Court to do is answer a purely hypothetical question: if petitioners had challenged the 1990 rule in 1990, would their challenge have been dismissed on ripeness grounds? While petitioners' hypothetical may be intellectually intriguing, it does not present an acceptable posture in which to decide a ripeness issue. Nor is the resolution of that question likely to have any kind of far-reaching significance that

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[7] Petitioners never explain how this Court's decision in *Reno*, which was not issued until 1993, could have led them to believe, in 1990, that a timely petition for review of the 1990 rulemaking would have been dismissed on ripeness grounds.

would justify this Court's review. Petitioners have presented no justification for this Court to reach out to decide a ripeness question in a case that was not decided on ripeness grounds and that thus does not squarely present such an issue. "Courts simply are not well-suited to answering hypothetical questions which involve guessing what the court might have done in the past." *Eagle-Picher Indus. v. EPA*, 759 F.2d 905, 914 (D.C. Cir. 1985).

The D.C. Circuit has aptly stated the problems which are presented when a petitioner who has failed to bring suit within a statutorily prescribed period seeks, after the fact, to be relieved of the consequences of his failure by raising a ripeness justification:

> As an initial matter, we think that the petitioners confound the obligations of the court with those of petitioner. It is the duty of the court to make the prudential judgment whether a challenge to agency action is ripe; it is the responsibility of petitioners to file for review within the period set by Congress.

Eagle-Picher, 759 F.2d at 912. Allowing a late-filing petitioner to evade the consequences of his tardiness by substituting his own self-serving and post-hoc rationalizations for the ripeness determination which should properly have been made by a reviewing court serves neither the policies and purposes addressed by the ripeness doctrine nor the interests that Congress has sought to protect by enacting timely filing requirements such as the one found in the Hobbs Act. *Id.* at 913. *See also Waste Management of Ill., Inc. v. EPA*, 945 F.2d 419, 422 (D.C. Cir. 1991).

In any event, petitioners' attempt to manufacture a conflict between the Sixth Circuit's analysis and this Court's decisions in *Lujan* and *Reno* simply cannot succeed. The ripeness analysis in both of those cases was premised upon the judicial review provisions of the Administrative Procedure Act, 5 U.S.C. § 701 *et seq.* (APA). Thus, neither case involved a ripeness analysis under a statute, such as the Hobbs Act, which governs

here and specifically authorizes immediate judicial review of regulations. In fact, this Court in *Lujan* took pains to make clear that its ripeness analysis had no applicability in the context of cases brought under judicial review provisions such as the one found in the Hobbs Act:

> Under the terms of the APA, respondent must direct its attack against some particular "agency action" that causes it harm. Some statutes permit broad regulations to serve as the "agency action," and thus to be the object of judicial review directly, *even before the concrete effects normally required for APA review are felt. Absent such a provision,* however, a regulation is not ordinarily considered the type of agency action "ripe" for judicial review under the APA until the scope of the controversy has been reduced to more manageable proportions . . . .

Lujan, 497 U.S. at 891 (emphasis added).

Petitioners' answer to the proposition that *Lujan* unequivocally excepted statutes like the Hobbs Act from its ripeness analysis is to raise another purely hypothetical issue, this time regarding the case or controversy requirements of Article III. Petitioners suggest that not only would they have run afoul of the prudential aspects of the ripeness doctrine had they attempted to challenge the 1990 Subpart K rulemaking in 1990, but they also may have failed to raise a proper "case or controversy" under Article III if they had complied with the Hobbs Act's judicial review provisions. Pet. at 16-17. This argument, however, does not demonstrate that the Sixth Circuit's analysis conflicted in any way with *Lujan* or *Reno*. If anything, petitioners' endless hypothesizing demonstrates how its claims are clearly *not* worthy of Supreme Court review.[8]

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[8] Moreover, the bizarre posture in which any ripeness and/or Article III questions would need to be reviewed if this Court were to grant review on the issues raised by petitioners argues

Finally, the simple fact is that petitioners *could* have brought a timely challenge to the 1990 rule. Contrary to petitioners' suggestion, Pet. at 17, such a challenge would not have raised a dispute in which the controversy was "only hypothetical." The dispute would have been quite real. As the Sixth Circuit observed, "the NRC's 1990 rule had an immediate impact. After promulgation of the rule, the very procedures about which petitioners now complain were in place, and any civilian reactor in the nation, including Palisades, was free to use the approved storage systems." *Kelley*, 42 F.3d at 1515 n.3. Moreover, petitioners were on notice that Consumers intended to take advantage of the general license issued by the 1990 rule. *See supra* at 4-5. Petitioners are therefore being disingenuous when they state that they did not have "reason, at that time, to challenge the 1990 regulations," Pet. at 5.[9] Not

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strongly against allowing review at this time. If petitioners are to succeed with respect to this issue, they would have to argue that they would have been unable to present a ripe, justiciable, case or controversy had they attempted to file suit in 1990. Respondents, on the other hand, would need to argue that a suit filed at that time would have met all ripeness and Article III requirements. Such a line-up of parties and arguments would represent a radical departure from the typical roles played by petitioners and agency respondents in these types of cases. The petitioners would be arguing *against* their own ability to bring a lawsuit; and the agency respondent would be arguing *in favor* of petitioners' ability to raise their claims. Such weighty and complex issues as ripeness and the requirements of Article III should not be resolved in such a context.

[9] For the same reason, petitioners misstate the facts when they claim that it was in June of 1992 that Consumers "provided notice, *for the first time*, that once the VSC-24 was added to the approved list of casks in Subpart K, it intended to use the VSC-24 casks under the general license." Pet. at 6 (emphasis added).

only did they have such a "reason," they also unquestionably would have satisfied the standing requirements of Article III had they attempted to act on that reason.

3. Petitioners next suggest that there is disagreement between the Sixth Circuit and the D.C. Circuit with respect to the so-called "reopener" doctrine. Pet. at 18-20. This is plainly untrue. The Sixth Circuit noted petitioners' argument, based upon D.C. Circuit precedent, that out-of-time challenges to regulations may be allowed where the agency has by some new promulgation "reopened" its analysis of the question resolved in the prior regulation. *Kelley*, 42 F.3d at 1515 n.3. The Sixth Circuit held, however, that these reopener cases had "no bearing" on its consideration of petitioners' claims because the NRC had not in fact "reopened" the approach to the general licensing of spent fuel storage casks in the 1990 Subpart K rulemaking. *Id.*

The Sixth Circuit did not in any way dispute the validity of the reopener doctrine or otherwise depart from D.C. Circuit precedent on this point. Petitioners' real quarrel is with how the Sixth Circuit *applied* those principles in this case. The Sixth Circuit's application of those principles, based upon the specific facts surrounding the NRC's actions in this case, does not raise such an important issue of general applicability that it deserves this Court's consideration. This is especially so since, as noted above, the Sixth Circuit's analysis on this issue had absolutely no bearing upon the outcome of this case.

In any event, the Sixth Circuit unquestionably correctly applied the principles underlying the reopener doctrine. The 1990 Subpart K rulemaking expressly contemplated that new casks would be added to the approved list as their designs were reviewed and certified by the NRC. The fact that, in 1993, the NRC employed its rulemaking procedure to add the VSC-24 cask to the list of approved spent fuel storage casks is in no way a reopening or a reconsideration of its 1990 Subpart K rulemaking. In the 1993 rulemaking, the NRC

solicited comments solely with respect to its proposal to amend the regulations in order to add the VSC-24 casks to the general license. In short, there are no indications that any aspect of the 1990 Subpart K rulemaking "was *in fact* reopened," or "*in fact* reconsider[ed]." *Public Citizen v. NRC*, 901 F.2d 147, 150 (D.C. Cir.), *cert. denied*, 498 U.S. 992 (1990) (emphases added). The mere fact that, in responding to comments on the 1993 VSC-24 cask rulemaking, the NRC responded to comments that addressed whether the NRC should hold an adjudicatory hearing before allowing use of the VSC-24 cask at Palisades in no way indicates that the NRC reconsidered the general license scheme promulgated in 1990.

> The "reopening" rule of [*Ohio v. EPA*, 838 F.2d 1325 (D.C. Cir. 1988)] is not a license for bootstrap procedures by which petitioners can come in on matters other than those actually at issue, goad an agency into a reply, and then sue on the grounds that the agency has re-opened the issue.

Public Citizen, 901 F.2d at 150 (quoting *American Iron & Steel Inst. v. EPA*, 886 F.2d 390, 398 (D.C. Cir. 1989), *cert. denied*, 497 U.S. 1003 (1990)).

II. THE SIXTH CIRCUIT'S DECISION CONSTRUING SECTION 189(a) OF THE ATOMIC ENERGY ACT IS ENTIRELY CONSISTENT WITH THE DECISIONS OF THE D.C. CIRCUIT AND CORRECTLY APPLIES THE NUCLEAR WASTE POLICY ACT

Petitioners maintain that this Court should review the question whether the NRC was obliged to allow Petitioners to voice their complaints about the proposed spent nuclear fuel cask in a full-blown, trial-type hearing, rather than through the "notice and comment" rulemaking (and informal hearings) that the NRC provided to them. The Sixth Circuit's determination that the NRC had no such legal obligation was simply a straightforward application of the well-settled rule that agencies are free to choose the most appropriate procedural mechanism,

absent an explicit statutory directive from Congress. *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*, 435 U.S. 519, 543 (1978); *FCC v. Pottsville Broadcasting Co.*, 309 U.S. 134 (1940). Petitioners do not deny the applicability of this general rule, nor do they point to any congressional directive, or even any NRC regulation, mandating the trial-type adjudicatory hearing they demand. Petitioners certainly cannot point to any federal court decision applying a different legal standard concerning the availability of an NRC adjudicatory hearing, either as a general interpretation of the AEA or in the specific context of the NWPA. Accordingly, when stripped to its essentials, the sum total of Petitioners' argument is that the NRC abused its discretion in the particular circumstances of this case, because the changes to procedures at the Palisades plant were sufficiently momentous to warrant a trial-type hearing and were not amenable to resolution through generic rulemaking. Even assuming *arguendo* that the NRC had so abused its discretion, and assuming further that federal courts are authorized to second-guess the NRC's judgment on these technical and procedural questions, this inherently fact-bound issue does not raise a legal question of general applicability or importance.

Petitioners boldly assert that there are "express statutory limits on the NRC's generic licensing powers, which the Sixth Circuit has disregarded." Pet. at 23. Petitioners, however, fail to cite any statutory language creating this limitation, or to point to any statute or regulation which in any way circumscribes the NRC's power under *Vermont Yankee* to choose rulemaking over adjudication and to resolve "site-specific" factual questions through a more informal process than a cumbersome trial-type hearing.

It is settled law that the NRC's general enabling statute – the Atomic Energy Act – does not require that the NRC proceed by an adjudicatory hearing. While Section 189(a) of the AEA requires a "hearing" where there is an "issuance or modification of rules and regulations

dealing with the activities of licensees," 42 U.S.C. § 2239(a), it does not require a hearing "on the record." Accordingly, it is black letter law that the "notice and comment" rulemaking proceeding provided here satisfies the statutory standard; a formal adjudicatory hearing is not required.[10]

Moreover, the NWPA, the statute covering the specific question of on-site spent nuclear fuel storage, certainly does not contemplate any adjudicatory hearing beyond that specifically mandated by the AEA. To the contrary, Section 133 of the NWPA, 42 U.S.C. § 10153, specifically directs that:

> The Commission shall, *by rule*, establish procedures for the licensing of any technology approved by the Commission under Section [218(a)] for use at the site of any civilian nuclear power reactor. (Emphasis added).

Similarly, Section 218(a) of the NWPA, 42 U.S.C. § 10198(a), provides in pertinent part that:

> [t]he Secretary shall establish a demonstration program . . . for the dry storage of spent nuclear fuel at civilian nuclear power reactor sites, with the objective of establishing one or more technologies that the Commission may, *by rule*, approve for use at the site of civilian nuclear power reactors *without, to the maximum extent practicable, the need for additional site-specific approvals by the Commission*. (Emphasis added).

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[10] *See* 5 U.S.C. § 553(a); *United States v. Florida E. Coast Ry. Co.*, 410 U.S. 224, 238 (1973); *United States v. Allegheny-Ludlum Steel Corp.*, 406 U.S. 742, 757 (1972); *Camp v. Pitts*, 411 U.S. 138, 140-41 (1973); *Siegel v. AEC*, 400 F.2d 778, 783 (D.C. Cir. 1968).

Thus, the plain language of the statute, as well as its legislative history,[11] clearly directs the NRC to license, by rule, dry storage of spent fuel at all reactor sites, while avoiding, to the maximum extent practicable, time-consuming and costly site-specific adjudicatory hearings of the sort petitioners demand.

Nor does any NRC regulation require a trial-type adjudication in the circumstances presented here. It has been the NRC's long-standing administrative practice to grant an adjudicatory hearing opportunity to evaluate *amendments* to a reactor's operating *license*. If there is a change to the actual text of the operating license, or the license will be effectively amended because the licensee proposes modifications to the plant that present new types of safety questions that have not previously been reviewed, then a hearing opportunity is triggered under NRC regulations. *See* 10 C.F.R. § 50.59; *Kelley*, 42 F.3d at 1515-16. If, however, proposed plant changes do not pose unreviewed safety questions requiring a license amendment, the NRC regulations sensibly do not evaluate such minor "site-specific" issues through a burdensome public hearing, but through less formal oversight procedures. *Id.*

There is no disagreement among the lower federal courts, or even among the parties here, concerning either these black-letter administrative law principles or the straightforward statutory and regulatory procedural

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[11] *See, e.g.*, H.R. Rep. No. 491, 97th Cong., 2d Sess. at 39-40, *reprinted in* 1982 U.S.C.C.A.N. at 3804-06:

> Many utilities . . . are not willing to be the first to go through licensing since there is the potential for extended licensing proceedings. This is due to the practice of prenoticing and extensive hearings which allow many opportunities for intervention and delay which not only frustrate their nuclear objectives but also carry over into rate making hearings . . . Licensing relief via legislation to deal with this problem is needed . . . .

requirements. Petitioners' sole complaint is that the NRC misapplied its own regulations by not finding that minor changes at the Palisades site to install and maintain the new VSC-24 cask were of sufficient magnitude to constitute a license amendment requiring an adjudicatory hearing. The court below properly refused to second-guess either the agency's judgment on how to interpret and enforce its own procedural regulations or its highly technical, fact-bound determination that the minor changes at Palisades did not present unreviewed safety questions requiring a license amendment. *Kelley*, 42 F.3d at 1515.

This decision is unquestionably correct. The federal courts properly give special deference to both an agency's interpretation of its own procedural rules and to the extraordinarily technical, scientific determinations that fall within the NRC's unique expertise.[12] Here, the Sixth Circuit painstakingly examined each of the petitioners' unsubstantiated allegations that there remained unreviewed safety questions requiring a license amendment and correctly determined that "[t]he NRC had clearly reviewed the issues" in either the general rulemaking or prior licensing hearings. *Kelley*, 42 F.3d at 1516.[13]

This conclusion is hardly surprising. In its rulemaking, the NRC made the unchallenged determination that the VSC-24 cask was safe and environmentally sound at

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[12] *See Vermont Yankee*, 435 U.S. at 543-44; *Thomas Jefferson Univ. v. Shalala*, 114 S. Ct. 2381, 2386 (1994) ("[w]e must give substantial deference to an agency's interpretation of its own regulations"); *Baltimore Gas & Elec. Co. v. Natural Resources Defense Council, Inc.*, 462 U.S. 87, 103 (1983) (the NRC is "making predictions, within its area of special expertise, at the frontiers of science. When examining this kind of scientific determination, as opposed to simple findings of fact, a reviewing court must generally be at its most deferential.").

[13] Petitioners did not attempt to point to any provision of the Palisades operating license which they maintained had been modified in order to store and maintain the VSC-24 casks.

every nuclear reactor site in the country that meets certain regulatory criteria.[14] That being so, it would be the rare case where the relatively straightforward procedures for using this cask would raise new environmental or safety issues at a nuclear reactor site which had previously been extensively reviewed to ensure its overall safety. In any event, even assuming *arguendo* that the NRC made some gross and obvious error in its technical judgment on the presence of such unreviewed safety questions at the Palisades site, this alleged "site-specific" factual mistake cannot, by definition, raise any legal issue of general applicability or interest.

Apparently recognizing this, petitioners seek to dress up their fact-bound challenge to the NRC's technical judgment at Palisades as implicating some broader legal question of administrative procedure, where the court below allegedly applied a different standard than this Court and the D.C. Circuit. Specifically, petitioners seem to argue that the D.C. Circuit in two decisions – *Nuclear Info. Resource Serv. v. NRC*, 969 F.2d 1169 (D.C. Cir. 1992) (*en banc*) (NIRS); and *Union of Concerned Scientists v. NRC*, 735 F.2d 1437 (D.C. Cir. 1984) (*UCS I*), *cert. denied*, 469 U.S. 1132 (1985) – held that the AEA requires adjudicatory hearings on all "site-specific" factual issues. Pet. at 22. They further claim that these decisions "directly follow" from this Court's decision in *Heckler v. Campbell*, 461 U.S. 458, 467 (1983), where the Court recognized that a statutory scheme which "contemplates that disability hearings will be individualized determinations based on evidence adduced at a hearing . . . does not bar the [agency] from relying on rulemaking to resolve certain classes of issues."

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[14] Petitioners do not allege any substantive deficiency in the agency's determination concerning the casks' safety and soundness. They challenge only the procedure used to evaluate the installation and maintenance of this cask at the particular nuclear reactor site.

As the Court below expressly recognized, however, these uncontroversial rulings on the extent to which an agency may use generic rules to supplant individualized factual adjudication *when such individualized adjudication is statutorily required* has nothing to with the issue in this case: whether an individualized adjudicatory hearing is required in the first instance. *Kelley*, 42 F.3d at 1510. The cases cited by petitioners *enhance* agencies' administrative flexibility by creating a common sense exception to a statutory requirement for case-by-case adjudicatory hearings, so that the agency need not "relitigate issues that may be established fairly and efficiently in a single rulemaking proceeding." *Heckler*, 461 U.S. at 467. As petitioners correctly note, the D.C. Circuit in *USC I* held that this exception cannot swallow the rule. An agency cannot evade statutorily-required adjudication by using rulemaking to resolve issues that truly do "require case-by-case consideration" and thus limit "the statutory hearings . . . to such a degree that they become meaningless." *Heckler*, 461 U.S. at 467; Pet. at 25. But the fact that an agency may not use the *Heckler v. Campbell* exception to avoid statutorily-mandated adjudication of genuine "site-specific" issues hardly can be converted into a rule that *every* "site-specific" issue – no matter how trivial – must be resolved through trial-type adjudication, in the absence of a statutory mandate to do so.

As the court below explained, *UCS I* stands only for the proposition that, *if* an adjudicatory hearing is required because a license is being issued or amended, then the NRC may not exclude material "site-specific" issues from that hearing. That decision did not – and could not under *Vermont Yankee* – purport to create some judicially-imposed requirement for adjudicatory hearings on *all* "site-specific" changes, even if those changes fall short of constituting a license amendment. Consequently, *UCS I* in no way requires a hearing in this case because

"[t]here is no licensing decision being made here." *Kelley*, 42 F.3d at 1515.[15]

Petitioner concedes that the Sixth Circuit so distinguished *UCS I*, but maintains that the changes at Palisades do, in fact, "amount to licensing activity." Pet. at 25. Again, however, this merely reflects petitioners' disagreement with the technical, procedural judgments of the NRC and the court below. It does not suggest any disagreement between the D.C. Circuit and the Sixth Circuit on the legal threshold for triggering a hearing opportunity under the AEA.

III. PETITIONERS' CLAIM REGARDING THE SIXTH CIRCUIT'S ANALYSIS OF WHETHER THE NRC NEEDED TO CONDUCT A SITE-SPECIFIC ENVIRONMENTAL ANALYSIS UNDER NEPA DOES NOT PRESENT AN ISSUE WORTHY OF THIS COURT'S CONSIDERATION.

Petitioners' final basis for seeking this Court's review of the Sixth Circuit's decision – their claim that the Sixth Circuit erred in concluding that the NRC did not need to conduct a "site-specific" NEPA inquiry relating to the environmental effects of spent fuel storage in the VSC-24 casks at the Palisades site, Pet. at 26-29 – does not raise any issues that are deserving of this Court's consideration.

Petitioners' claim that the NRC needed to conduct a site-specific NEPA environmental analysis relating to

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[15] *NIRS* is plainly distinguishable on the same basis. We nevertheless further note that *NIRS upheld* the NRC's decision to use a rulemaking procedure and, although petitioners suggest otherwise, made no ruling on whether adjudicatory hearings were required to show a linkage between a certified general design and the site-specific design. In the quotation emphasized by petitioners, the D.C. Circuit was simply *describing* the NRC's *own* regulatory requirements – it was not imposing any requirement on the NRC. *See* Pet. at 24; *NIRS*, 969 F.2d at 1171.

spent fuel storage in the VSC-24 casks at the Palisades site completely ignores the NRC's determination that the VSC-24 cask was safe for use at any nuclear power plant site if used under approved conditions. Given this determination, there would have been no need for the NRC to conduct a site-specific inquiry relating to the effects of use of the VSC-24 cask at the Palisades site. Since the casks will perform their intended safety function at any site coming within the terms of the general license, there was simply no need to conduct a site-specific inquiry of the type petitioners desire. Significantly, petitioners do not challenge the NRC's conclusions in this regard.[16] Even if petitioners did challenge the NRC's technical determination, such a challenge, which would involve an attempt to override the informed judgment of an agency regarding a fact-specific, technical matter coming within the agency's prescribed area of expertise, would not raise a certworthy issue. This is especially so since the NRC's determination is just the type of technical judgment that this Court has long held is entitled to great deference. *See Baltimore Gas*, 462 U.S. at 103.

Petitioners make the conclusory assertion, without explanation, that the Sixth's Circuit's analysis may be inconsistent with this Court's decision in *Baltimore Gas*. Petitioners' failure to expand on their naked assertion is no doubt because this Court in *Baltimore Gas* explicitly endorsed the NRC's use of rulemaking to address NEPA issues generically:

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[16] To be sure, petitioners do raise the letter written by an EPA employee regarding the use of the VSC-24 cask at Palisades as well as a letter written by one NRC employee raising similar concerns. Petitioners completely ignore the NRC's response to the concerns raised in these non-record letters, however, which response *confirms* the NRC's conclusion that there would be no site-specific environmental effects from use of the VSC-24 cask at the Palisades site. *See supra* at 7.

> NEPA does not require agencies to adopt any particular internal decisionmaking structure . . . The generic method chosen by the agency is clearly an appropriate method of conducting the hard look required by NEPA.

462 U.S. at 100-01 (citations omitted). *See also Vermont Yankee*, 435 U.S. at 548 (upholding the NRC's broad authority to resolve NEPA issues by rule, and noting that "the only procedural requirements imposed by NEPA are those stated in the plain language of the Act").

Petitioners are thus reduced to arguing that the Sixth Circuit's "reading" of *Baltimore Gas* conflicts with the Third Circuit's reading of that decision in *Limerick Ecology Action, Inc. v. NRC*, 869 F.2d 719 (3d Cir. 1989). There simply is no such conflict between this case and *Limerick*, however. To begin with, the Third Circuit in *Limerick* was not faced with any issue regarding the interplay of NEPA with the NWPA. Thus, the Third Circuit was not faced with interpreting or applying Congress' decision, expressed in the NWPA, to have the NRC, to the maximum extent practicable, consider the licensing of on-site spent fuel storage through rulemaking. *See* 42 U.S.C. § 10198(a). *See also supra* at 21.

In *Limerick*, the Third Circuit held that the NRC could not rely on an NRC policy statement to preclude consideration of so-called severe accident mitigation design alternatives ("SAMDAs") in a proceeding considering the issuance of a full power operating license for the Limerick plant in Pennsylvania. The Third Circuit acknowledged the holding of *Baltimore Gas* and recognized, as did the parties, that the "NRC may preclude consideration of generic issues by rulemaking." 869 F.2d at 733; *see id.* at 736-37. The Court found, however, that *Baltimore Gas* was "readily distinguishable," since "in *Baltimore Gas* the NRC proceeded on the basis of a formal rulemaking, whereas in [*Limerick*], . . . the NRC promulgated the decision not to consider [SAMDAs] as a policy statement." *Id.* at 736-37. This distinction was crucial because (1) a policy

statement, unlike a rule, was entitled to no deference and (2) again unlike a rule, when an agency applies a policy statement in a particular context, the policy expressed in the statement had to be supported as if the policy statement did not exist. *Id.* at 733, 737. This crucial distinction between *Limerick* and *Baltimore Gas* does not exist in the case at bar.

Furthermore, the Third Circuit's refusal to rely on a generic environmental analysis in *Limerick* made some sense in light of the fact that the proceeding there involved the grant of an operating license. Thus, there was at that time no final, approved comprehensive environmental analysis of the Limerick site. Here, by contrast, there not only exists an in-depth environmental analysis of the Palisades site, *see Kelley*, 42 F.3d at 1519-20, but the NRC has also reached an expert conclusion, through the VSC-24 cask rulemaking, that the VSC-24 cask would perform its intended safety function at *any* applicable site if used under approved conditions.

In sum, petitioners are simply incorrect when they state that the Sixth Circuit's NEPA analysis "does not square with either the facts presented, this Court's decision in *Baltimore Gas*, or the holding of the Third Circuit in *Limerick*." Pet. at 29. Because the Sixth Circuit's NEPA analysis otherwise represents a straightforward application of well-settled principles, the Sixth Circuit's decision presents no occasion for the exercise of this Court's powers of review.

CONCLUSION

For the reasons stated herein, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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Dated: May 12, 1995

APPENDIX

42 U.S.C. § 10153 (Nuclear Waste Policy Act) ...App. 1

Letter from Gerald B. Slade to NRC .....App. 2
August 17, 1990

Letter from NRC to Robert A. Fenech.....App. 4
September 20, 1994

42 U.S.C. § 10153

NUCLEAR WASTE POLICY ACT

SEC. 133. The Commission shall, by rule, establish procedures for the licensing of any technology approved by the Commission under section 10198(a) for use at the site of any civilian nuclear power reactor. The establishment of such procedures shall not preclude the licensing, under any applicable procedures or rules of the Commission in effect prior to such establishment, of any technology for the storage of civilian spent nuclear fuel at the site of any civilian nuclear power reactor.

August 17, 1990

Consumers Power
Covert, MI 49043

Director, Division of Industrial
and Medical Nuclear Safety
Office of Nuclear Material
Safety and Safeguards
United States Nuclear
Regulatory Commission
Washington, D.C. 20555

DOCKET 72-7 – PALISADES PLANT – WITHDRAWAL OF LICENSE APPLICATION FOR AN INDEPENDENT SPENT FUEL STORAGE INSTALLATION AT THE PALISADES NUCLEAR PLANT

On March 9, 1990, Consumers Power Company submitted a license application for an Independent Spent Fuel Storage Installation at the Palisades Plant in accordance with 10 CFR Part 72. On May 31, 1990, the company submitted an Environmental Report in support of the application. The Commission published notice of opportunity for hearing on the application on July 13, 1990 (55 FR 28853).

On July 18, 1990, the Commission published notice of adoption, effective August 17, 1990, of amendments to Part 72 to provide for the storage of spent nuclear fuel at any power reactor site under a general license, if certain conditions are satisfied.

Meanwhile, a number of petitions to intervene with respect to Consumers Power Company's pending Part 72 application have been filed. We believe the need for a site-specific proceeding is mooted by adoption of the new

rule. Accordingly, this is to notify you that the Company hereby withdraws its March 9, 1990 application, and that it intends to utilize the general license granted in new Subpart K when it is able to satisfy the conditions of the general license. By copy of this letter, we are so advising all those whose intervention petitions we have received.

/s/

Gerald B. Slade
General Manager

cc: Petitioners

UNITED STATES
NUCLEAR REGULATORY COMMISSION

September 20, 1994

Mr. Robert A. Fenech
Vice President, Nuclear Operations
Consumers Power Company
Palisades Plant
27780 Blue Star Memorial Highway
Covert, MI 49043

SUBJECT: PALISADES PLANT – NRC FINAL SAFETY ASSESSMENT OF INDEPENDENT SPENT FUEL STORAGE INSTALLATION (ISFSI) SUPPORT PAD (TAC NO. M88875)

Dear Mr. Fenech:

In May 1993, NRC issued a certificate of compliance, pursuant to 10 CFR Part 72, to Sierra Nuclear Corporation (SNC), approving the use of the VSC-24 cask, for a 20-year term, by holders of 10 CFR Part 50 licenses, as an ISFSI. The VSC-24 cask was first used under the general license by the Consumers Power Company (CPCo) at the Palisades plant in Michigan. Since that time, questions were raised about the possible effects of earthquakes and erosion at the Palisades site on the safe storage of spent fuel in the VSC-24 dry casks. On the basis of these concerns, in March 1994, NRC initiated an independent assessment to more closely examine the behavior of the pad at Palisades with respect to seismic and other natural hazards in order to address concerns that have been raised subsequent to the construction and initial use of the facility. The staff's preliminary findings are described

in a draft safety assessment (DSA) forwarded to you on May 18, 1994.

On May 23, 1994, a public meeting was held with CPCo in Benton Harbor, Michigan, to discuss CPCo's examination of the dry cask storage pad and NRC's independent assessment of that examination. Since that meeting, NRC continued to address comments and questions received from the public regarding the dry cask storage at Palisades. The enclosed final safety assessment (FSA) contains the results of the NRC independent examination of the location of the foundation for the ISFSI at Palisades. Attached to the FSA are NRC responses to the appropriate comments and questions on this issue.

After careful consideration of the public comments and the technical evaluations performed by CPCo and by NRC's consultants, the staff's FSA concludes that the location of the storage pad at the Palisades site is acceptable to support the concrete storage cask against all effects of the design-basis earthquake for the site, and against other such postulated natural hazards as high winds and floods. Furthermore, the VSC-24 dry casks and the concrete storage pad will not pose any unacceptable risk to public health and safety because of substantial horizontal and vertical separation of the ISFSI from the lake shore, the installed shoreline protection, surveillance and monitoring programs established by CPCo, and the ability to take remedial measures to remove sand deposited by wind or water. We recognize that your surveillance and monitoring programs further ensure safe operation of the dry cask storage. Please keep the records of your surveillance available for future NRC review. The NRC staff reviewed CPCo's analyses and determined that

its conclusions are similar to those of NRC. Please contact the NRC Project Manager, Mr. Tony Hsia, at (301) 504-3028, if you have any questions.

Sincerely,

/s/

Ledyard B. Marsh, Project Director
Project Directorate III-1
Division of Reactor Projects – III/IV
Office of Nuclear Reactor Regulation

Docket No. 50-255

Enclosure: Final Safety Assessment, w/attachments

(3)

No. 94-1702

JUN 7 1995
OFFICE OF THE CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1994

FRANK J. KELLEY, ATTORNEY GENERAL OF MICHIGAN, ET AL., PETITIONERS

v.

IVAN SELIN, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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22 pp

QUESTIONS PRESENTED

The Nuclear Waste Policy Act of 1982 (NWPA), 42 U.S.C. 10198(a), required the Nuclear Regulatory Commission (NRC) to establish procedures for the generic approval of storage containers for spent nuclear fuel "without, to the maximum extent practicable, the need for additional site-specific approvals." Pursuant to the NWPA, the NRC determined that it was practicable generically to approve certain rugged and durable spent fuel storage casks for use at any plant site without the need for site-specific approvals. The NRC thus promulgated a final rule in 1990 generically approving four cask designs, issuing a general license for their use at any licensed power reactor site, and establishing procedures for future generic approval of additional designs. In 1993, the NRC promulgated a rule adding a new cask design to the list of those it had generically approved. The questions presented are:

1. Whether, notwithstanding the Hobbs Act's 60-day limitation period, petitioners' 1993 challenge to the 1990 NRC rule was timely because the NRC relied on that rule to approve a new cask design in 1993.

2. Whether site-specific adjudicatory hearings are required under the Atomic Energy Act of 1954, 42 U.S.C. 2239(a)(1)(A) (Supp. V 1993), and site-specific environmental impact statements are required under the National Environmental Policy Act of 1969, 42 U.S.C. 4321 *et seq.*, before a utility may use casks generically licensed for use at any facility without site-specific approvals.

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In the Supreme Court of the United States

OCTOBER TERM, 1994

No. 94-1702

FRANK J. KELLEY, ATTORNEY GENERAL OF MICHIGAN, ET AL., PETITIONERS

v.

IVAN SELIN, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-40a) is reported at 42 F.3d 1501. The opinion of the district court (Pet. App. 41a-51a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on January 11, 1995. The petition for a writ of certiorari was filed on April 11, 1995. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Congress enacted the Nuclear Waste Policy Act of 1982 (NWPA), 42 U.S.C. 10101 *et seq.*, in re-

sponse to growing concerns that the nation lacked facilities for the permanent disposal of high-level nuclear waste, including spent fuel from nuclear power plants licensed by the Nuclear Regulatory Commission (NRC). Without a means for permanent disposal of accumulating spent fuel, utilities stored it at nuclear plant sites in pools designed only for temporary storage of limited amounts of spent fuel. Congress recognized that the spent fuel pools at several nuclear power plants were filling up, creating a risk of premature shutdown of those plants. See Pet. App. 39a.

The NWPA set a schedule for the siting, construction, and operation of permanent federal repositories for the disposal of high-level nuclear waste. 42 U.S.C. 10131-10145. That Act also addressed the immediate need for additional spent fuel storage capacity by speeding the development, approval, and deployment of interim on-site storage technologies. See generally 42 U.S.C. 10151-10157. In that regard, the NWPA directed the Secretary of Energy to establish a demonstration program for the dry storage of spent fuel at existing nuclear plants in "fuel storage casks, caissons, or silos." 42 U.S.C. 10198(a). The objective of the demonstration program was to establish "one or more technologies that the [Nuclear Regulatory] Commission may, by rule, approve for use at the sites of civilian nuclear power reactors without, to the maximum extent practicable, the need for additional site-specific approvals by the Commission." *Ibid.* The NWPA further provided that the "Commission shall, by rule, establish procedures for the licensing of any technology approved by the Commission under [42 U.S.C. 10198(a)] for use at the site of any civilian nuclear power reactor." 42 U.S.C. 10153.

The NRC found that it is practicable to construct casks sufficiently durable and resistant to extreme environmental conditions as to be usable for interim spent fuel storage at any reactor site. 55 Fed. Reg. 29,183 (1990). Thus, in 1990, the NRC implemented NWPA's statutory directive by promulgating a rule referred to as Subpart K. 10 C.F.R. Pt. 72 Subpt. K. That rule granted generic approval of four spent fuel storage cask designs, 55 Fed Reg. 29,191-29,193; 10 C.F.R. 72.214 (1991), and generally licenses utilities to use any approved cask at any licensed nuclear power plant for a period of up to 20 years, provided that the utility meets certain detailed conditions, 10 C.F.R. 72.210, 72.212. At the same time, the NRC promulgated Subpart L, which established regulatory procedures for adding cask designs to the approval list. 10 C.F.R. Pt. 72 Subpt. L. See 55 Fed. Reg. 29,181, 29,193-29,194 (1990).

The NRC determined that Environmental Impact Statements (EIS) were not required for storage of spent fuel in NRC-approved casks at reactor sites, and that only an overall Environmental Assessment (EA) was required. 55 Fed. Reg. 29,187 (1990); see 10 C.F.R. 51.23. The NRC explained that "free-standing casks, being very strong and massive structures, are independent of the effects of site-specific natural phenomena." 55 Fed. Reg. 29,186 (1990) (quoted in Pet. App. 23a). The NRC thus published an EA with the 1990 rule. The EA reviewed more than 30 years of experience in the United States and abroad with dry storage of spent fuel, and found that on-site use of casks meeting the rule's rigorous criteria would have insignificant environmental impacts. C.A. App. 464-482; see Gov't. C.A. Br. 7-8.

When the NRC promulgated its final rule in 1990, it had under consideration an application by the Consumers Power Company (Consumers) for a license amendment to allow Consumers to construct and use dry casks at the Palisades Nuclear Plant in Van Buren County, Michigan (Palisades). Pet. App. 4a-5a. The NRC had issued a notice of opportunity for hearing on the proposed license amendment, and had received a number of responses. On August 17, 1990, when the new rule became effective, however, Consumers withdrew its application on the ground that "the need for a site-specific proceeding is mooted by adoption of the new rule." Consumers' Opp. App. 2-3. Consumers' withdrawal letter to the NRC explained that "the Company * * * intends to utilize the general license granted in new Subpart K when it is able to satisfy the conditions of the general license," and stated that it was sending copies of its letter to all those who petitioned for a hearing on its proposed license amendment. *Ibid.*; see also 55 Fed. Reg. 35,384 (1990) (noting availability of letter for public inspection). Despite the public notice of Consumers' intent to construct storage casks at Palisades under Subpart K without further site-specific approval, neither petitioners nor any other persons then sought review of Subpart K.

In April, 1991, the manufacturer of a cask design referred to as VSC-24 applied to the NRC to add that design to the list of cask designs the NRC had generically approved. The manufacturer also then requested an exemption from NRC regulations to permit construction of VSC-24 casks at the Palisades site before NRC's generic approval of the cask. Notice of that exemption request was published in the *Federal Register*, 56 Fed. Reg. 41,870 (1991),

and the NRC received no objections to the proposed exemption.

In June, 1992, the NRC issued a notice of proposed rule, stating its intent to grant generic approval for the VSC-24 cask. 57 Fed. Reg. 28,645-28,647 (1992). In December, 1992, petitioner Frank J. Kelley, Attorney General of Michigan, wrote to the NRC Chairman, respondent Ivan Selin, to express his concerns about the proposed use of VSC-24 casks at Palisades. Corrected Index of Record No. 273 Attach. Kelley acknowledged that "the NRC is not required to hold a public hearing," but asked that the NRC nonetheless exercise its discretion to hold an adjudicatory hearing. *Ibid.* The NRC declined to do so, but did conduct an informal public meeting at which petitioner Kelley and others presented their views and NRC officials responded to questions. See 58 Fed. Reg. 17,950 (1993). On April 7, 1993, the NRC published its final rule adding the VSC-24 cask to the list of approved designs.

2. On May 4, 1993, three days before the effective date of the rule adding the VSC-24 to the list of generically approved casks, petitioners filed a complaint in district court seeking an injunction and a temporary restraining order prohibiting Consumers from loading fuel into VSC-24 casks. The district court dismissed the action on May 10, 1993, for lack of jurisdiction (Pet. App. 41a-52a), and transferred the case to the court of appeals (*id.* at 53a-54a).

3. In the court of appeals, petitioners contended that the NRC's failure to hold an adjudicatory hearing on Consumers' proposed use of VSC-24 casks violated Section 189(a) of the Atomic Energy Act of 1954 (AEA), 42 U.S.C. 2239(a)(1)(A) (Supp. V 1993), and that the Commission's failure to issue a site-specific environmental impact statement violated

the National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. 4332(2)(C).

The court of appeals denied petitioners' claims. The court held that no adjudicatory hearing regarding the proposed use of VSC-24 casks at Palisades was required. The generic approval of designs for spent fuel storage casks was, the court held, "exactly the type of NRC decision which may be the subject of generic rulemaking" under the NWPA, 42 U.S.C. 10198(a). Pet. App. 22a. In any event, the Atomic Energy Act, upon which petitioners relied, "nowhere describes the content of a hearing or prescribes the manner in which this 'hearing' is to be run." Pet. App. 17a (quoting *Union of Concerned Scientists* v. *United States Nuclear Regulatory Comm'n*, 920 F.2d 50, 53 (D.C. Cir. 1990)); see also Pet. App. 21a-22a ("nothing in the applicable statutes or the relevant precedents compels the NRC to hold a formal adjudicatory hearing").[1] The court pointed out that, "[a]lthough the NRC denied petitioners' request for an adjudicatory hearing concerning the use of the VSC-24 casks at Palisades, the NRC did hold a 'hearing' at which Michigan citizens were able to comment."

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[1] Section 189(a) of the Atomic Energy Act, 42 U.S.C. 2239(a)(1)(A) (Supp. V 1993), provides:

> In any proceeding under this chapter, for the granting, suspending, revoking, or amending of any license or construction permit, or application to transfer control, and in any proceeding for the issuance or modification of rules and regulations dealing with the activities of licensees, * * * the [Nuclear Regulatory] Commission shall grant a hearing upon the request of any person whose interest may be affected by the proceeding, and shall admit any such person as a party to such proceeding.

Pet. App. 21a. The court of appeals also observed that, even insofar as site-specific issues are concerned, hearing rights under the AEA are limited to issues "material to [a] licensing decision," and that "[t]here [wa]s no licensing decision being made here," where no greater operating capacity was granted, and no safety requirements or other rules were changed. *Id.* at 25a-26a.

The court of appeals also upheld the NRC's decision to issue only a generic Envionmental Assessment on the environmental impact of dry cask storage. Pet. App. 32a-39a. The court held that the NRC had sufficient grounds for its conclusion that the 1993 rule approving the VSC-24 cask was not a "major Federal action significantly affecting the quality of the human environment" and that an environmental impact statement was therefore not required under the National Environmental Policy Act, 42 U.S.C. 4332(2)(C). Pet. App. 32a.[2] The court concluded that, in its EA, "the NRC did take a 'hard look' at the environmental consequences of its action, as required by NEPA." *Id.* at 39a. The court rejected petitioners' NEPA claim as "essentially an attack on the policy choice made by Congress, and embodied in the NWPA," to empower the NRC to promulgate rules generically authorizing on-site spent nuclear fuel storage. *Ibid.*[3]

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[2] Section 102 of the National Environmental Policy Act, 42 U.S.C. 4332(2)(C), requires federal agencies to include an Environmental Impact Statement in every recommendation or report on "major Federal actions significantly affecting the quality of the human environment."

[3] The court of appeals also observed that petitioners acknowledged the propriety of a generic environmental as-

To the extent that petitioners' claims required invalidation of the procedures for generic approvals established by the NRC's 1990 rule, the court of appeals held that they were barred by the Hobbs Act's 60-day period of limitation. Pet. App. 26a-27a n.3. The court of appeals rejected the argument that, under *Reno* v. *Catholic Social Services, Inc.*, 113 S. Ct. 2485 (1993), and *Lujan* v. *National Wildlife Fed'n*, 497 U.S. 871 (1990), petitioners could not have challenged the 1990 rule until 1993, when the NRC granted generic approval for the particular cask design Consumers proposed to use at Palisades. The court stated:

> In this case, the NRC's 1990 rule had an immediate impact. After promulgation of the rule, the very procedures about which petitioners now complain were in place, and any civilian reactor in the nation, including Palisades, was free to use the approved storage systems.

Pet. App. 27a n.3. The court also rejected petitioners' contention that the NRC "reopened" the 1990 rule (and thereby again subjected it to review) by promulgating the 1993 rule. The court held that the NRC in its 1993 rule merely added a new form of storage cask to the list of approved systems, and did not thereby "reconsider[] the propriety of its grant of a general license" or "restructur[e] its earlier rules." *Ibid.*

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sessment "regarding truly generic issues posed by the VSC-24 casks." Pet. App. 32a (quoting Pet. C.A. Br. 43). Other than a "conclusory statement in their brief on appeal," however, the court noted that "petitioners have not identified, much less established, any factor requiring a site-specific analysis before the VSC-24 cask could be added to the list of approved casks." Pet. App. 37a.

ARGUMENT

The NRC's generic rather than site-specific procedures for approving dry storage casks for interim spent fuel storage properly implemented the mandate of the Nuclear Waste Policy Act. That procedural approach is consistent with the NRC's obligations under the Atomic Energy Act and National Environmental Policy Act, and no court of appeals has held to the contrary. To the extent that petitioners sought in 1993 to challenge the NRC's 1990 final rule adopting a generic approach to cask design approvals, the court of appeals correctly held that their claims are time-barred. No further review is warranted.

1. a. The court of appeals correctly concluded that petitioners untimely challenged, and thus are bound by, the procedural framework the NRC established in its 1990 rule providing for generic approval of spent fuel storage casks. It was only when Consumers Power Company in 1993 began to use casks the NRC had generically approved that petitioners sought site-specific consideration. To the extent that petitioners' asserted harm flows from the 1990 rule, their challenge comes too late.

Challenges to NRC rules ordinarily must be filed within 60 days of their issuance. Appellate jurisdiction to review "any proceeding for the issuance or modification of rules and regulations dealing with the activities of [NRC] licensees" is governed by the Hobbs Act. 28 U.S.C. 2342(4); 42 U.S.C. 2239 (a)(1)(A) (Supp. V 1993).[4] The Hobbs Act pro-

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[4] The Hobbs Act grants the courts of appeals "exclusive jurisdiction to enjoin, set aside, suspend (in whole or in part), or to determine the validity of" all "final orders of the [Nuclear Regulatory] Commission made reviewable by

vides that "[a]ny party aggrieved by the final order may, within 60 days after its entry, file a petition to review the order." 28 U.S.C. 2344.[5]

As petitioners acknowledged, Consumers gave notice, in a letter to the NRC dated August 17, 1990, of its withdrawal of its site-specific application. See Pet. C.A. Br. 11-12. That same letter explicitly stated Consumers' intent to utilize the general license granted in new Subpart K. Thus, contrary to petitioners' claim that Consumers in 1990 "apparently abandoned" its plan to use dry storage casks at Palisades (Pet. 5), Consumers in fact then gave notice that it was withdrawing its site-specific application only because the new rule had rendered that procedure unnecessary. At that time, the Hobbs Act's 60-day period had not yet run. Petitioners could have, but did not, request that the NRC reconsider the 1990 rule at that time. If such a request had been denied, petitioners would have had a timely opportunity to challenge the rule in federal court.

Petitioners assert that the 60-day limitations period ran not from the promulgation of the 1990 rule, but from the date in 1993 when the NRC added the

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section 2239 of title 42." 28 U.S.C. 2342(4). The Atomic Energy Act, 42 U.S.C. 2239(b) (Supp. V 1993), defines such reviewable orders to include "[a]ny final order entered in any proceeding of the kind specified in [42 U.S.C. 2239(a)]," which in turn refers to "any proceeding for the issuance or modification of rules and regulations dealing with the activities of [NRC] licensees."

[5] Even if the 1990 NRC rule were subject not to the Hobbs Act's 60-day time limit, but to the 180-day limit established by the Nuclear Waste Policy Act (NWPA), 42 U.S.C. 10139(c), the time in which to seek review had long since expired when petitioners challenged that rule in 1993.

VSC-24 cask design to the list of those it had generically approved. Relying on *Reno* v. *Catholic Social Services, Inc.*, 113 S. Ct. 2485 (1993), and *Lujan* v. *National Wildlife Fed'n*, 497 U.S. 871 (1990), petitioners reason that before 1993, they had no ripe claim against the 1990 rule because it had not yet had a concrete effect on them. They thus contend that their opportunity to challenge the 1990 rule should be deemed to have first arisen in 1993. The court of appeals correctly rejected that contention.

This Court in *Catholic Social Services* considered claims raised by a class of aliens challenging Immigration and Naturalization Service (INS) regulations that potentially deprived them of the ability to obtain temporary residence status. The Court held the aliens' claims unripe because temporary residence status is not "automatically bestowed on eligible aliens"; rather, each alien desiring temporary residence is required to "take further affirmative steps, and to satisfy criteria beyond those addressed by the disputed regulations." 113 S. Ct. at 2496. Here, in contrast, "the NRC's 1990 rule had an immediate impact." Pet. App. 26a n.3. The 1990 rule granted a general license for use of approved casks without regard to site-specific considerations, and established the generic procedures by which the NRC added the VSC-24 cask to the list of approved casks without a site-specific hearing or environmental review. Petitioners' situation is thus precisely the converse of that of the aliens in *Catholic Social Services*. Petitioners' claims were not unripe due to an unmet requirement of "further affirmative steps"; rather, their claims address the agency's *failure* to require any further steps before Consumers availed itself of

the benefits of the 1990 rule.[6] When no further steps are required to trigger a regulation's challenged effect, the regulation is subject to immediate review.

This Court's decision in *Lujan* is also not to the contrary. The Court there rejected an amorphous challenge to the Bureau of Land Management's (BLM) land withdrawal review program because, in seeking to challenge that "program," petitioners did not "refer to a single BLM order or regulation, or even to a completed universe of particular BLM orders and regulations." 497 U.S. at 890. The time-barred claims in this case, in contrast, addressed the clearly identifiable 1990 NRC rule.[7] Moreover, the Court in *Lujan* observed that, unlike the Administrative Procedure Act that governed there, "[s]ome statutes permit broad regulations to serve as the 'agency action,' and thus to be the object of judicial review directly, even before the concrete effects normally required for APA review are felt." 497 U.S. at 891. As the court of appeals here recognized, the Hobbs Act amounts to just such specific statutory authorization of challenges to NRC regulations. Pet.

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[6] Petitioners' challenges to such categorical approval are thus more closely analogous to claims that this Court in *Catholic Social Services* recognized might well have been ripe —those of aliens subject to a categorical "front-desking" policy of prefiling rejection of applications of aliens whom INS personnel forecast would be ineligible under the challenged regulations. 113 S. Ct. at 2497-2499.

[7] The *Lujan* Court acknowledged that the claim of a member of one of the petitioner organizations would "no doubt" be ripe for review once a mining permit application she identified as pending was granted. 497 U.S. at 892 n.3. Under that logic, petitioners' claims in this case were ripe as of 1990, because no site-specific application was required.

App. 26a n.3. *Lujan* is therefore inapplicable by its own terms.

Even if petitioners were correct that some action in addition to the 1990 rule's generic approval and general licensing was required before their claims would be ripe, such action took place in 1991. The manufacturer of the VSC-24 casks then sought generic approval of the cask design and, in an action announced by the NRC in a Federal Register notice, asked the NRC for an exemption allowing immediate construction of VSC-24 casks at the Palisades site pending final approval by NRC of the cask design. 56 Fed. Reg. 41,870 (1991). Under their own timeliness theory, petitioners could at that juncture have objected to an exemption, requested reconsideration of the 1990 rule, and/or filed a petition under 10 C.F.R. 2.206 protesting application of the generic approach of the 1990 rule to the Palisades site. They took no such steps.

b. The court of appeals correctly held that the NRC's 1993 rule did not restart the period for seeking judicial review of the 1990 rule under the "reopener doctrine" set forth in *Edison Elec. Inst.* v. *United States EPA*, 996 F.2d 326, 331-332 (D.C. Cir. 1993); see also *Public Citizen* v. *NRC*, 901 F.2d 147, 150-153 (D.C. Cir.), cert. denied, 498 U.S. 992 (1990); *State of Ohio* v. *United States EPA*, 838 F.2d 1325, 1328-1329 (D.C. Cir. 1988). In its 1993 rule, the NRC did not reconsider the propriety of the 1990 rule, but "merely add[ed] a new form of storage cask to its list of approved systems." Pet. App. 26a n.3. In proposing the 1993 rule, the NRC referred to the 1990 rule as setting the established procedural framework for generic approval of new casks; the NRC did not indicate any intent to reconsider the

generic-approval approach as such. 57 Fed. Reg. 28,645-28,647 (1992). In responding to public comments, the NRC expressly noted that commenters "discussed topics that were not the subject of this rulemaking," including whether "[a] formal hearing should be required at each site using dry casks." 58 Fed. Reg. 17,950-17,951 (1993). In *Edison*, by contrast, the D.C. Circuit found that the agency reopened consideration of an existing rule by soliciting additional comments on it and by advancing a possible "alternative approach" to that rule. 996 F.2d at 329-330, 332. Each of the other cases upon which petitioners rely (Pet. 18-20) similarly based its timeliness decision on findings that the agency had indicated its intent to reconsider an existing rule. Given the absence of any such indication here, the reopener doctrine does not apply.

2. a. The court of appeals correctly held that petitioners were not entitled to a site-specific licensing hearing under the Atomic Energy Act, 42 U.S.C. 2239(a)(1)(A) (Supp. V 1993). The Nuclear Waste Policy Act directed the NRC to determine whether it was technologically feasible to construct dry storage containers for spent nuclear fuel that would be sufficiently strong and durable to withstand any environmental conditions at existing commercial nuclear plants, thereby obviating the need for site-specific evaluations before the containers could be used for interim storage. The NWPA thus called upon the NRC to establish procedures for the generic approval of standardized spent fuel storage technologies "without, to the maximum extent practicable, the need for additional site-specific approvals." 42 U.S.C. 10198(a). The NRC determined that devel-

opment of such containers was indeed feasible, and implemented the NWPA by issuing a general license for four cask designs specifying the detailed conditions under which the casks can appropriately be used at any commercial nuclear plant site. To the extent that such generic approval overrides site-specific hearings otherwise available under the Atomic Energy Act, Congress clearly intended that result. Pet. App. 22a.

The court of appeals correctly held that the AEA did not, in any event, require an adjudicatory hearing under these circumstances, and no court of appeals has held to the contrary. There was no site-specific licensing decision at issue. Pet. App. 25a-26a. Moreover, the NRC provided an opportunity for petitioners to be heard in the rulemaking regarding the proposed use of VSC-24 casks at Palisades. *Id.* at 21a. Nothing in the AEA specifies that an informal hearing is inadequate in such circumstances, or that the kind of formal adjudicatory hearing petitioners seek is required.[8]

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[8] Petitioners' reliance on *Nuclear Information Resource Service* v. *NRC*, 969 F.2d 1169, 1173 (D.C. Cir. 1992) (en banc), depends on their untenable assertion that the installation of spent fuel storage casks is "just like the issuance of a construction permit, expansion of a wet pool, or licensing of a new reactor." Pet. 25. In the NWPA, however, Congress treated deployment of dry storage technology quite differently from the construction or expansion of nuclear reactors, and did so for good reason. The premise of Congress's authorization of generic, non-site-specific licensing of dry storage casks was that such casks might be manufactured so as to be secure at any existing reactor site. Construction and licensing of nuclear reactors themselves, and expansion of wet pools for storage of spent fuel, in contrast, generally present site-specific issues not amenable to fully generic regulatory treatment.

b. The court of appeals also correctly decided that the National Environmental Policy Act does not require an Environmental Impact Statement here. There is no basis for petitioners' contention (Pet. 26-29) that the decision below conflicts with *Baltimore Gas & Elec. Co.* v. *Natural Resources Defense Council, Inc.*, 462 U.S. 87 (1983), and *Limerick Ecology Action, Inc.* v. *United States NRC*, 869 F.2d 719 (3d Cir. 1989). This Court in *Baltimore Gas* upheld a generic NRC rule directing licensing boards to assume, for purposes of the consideration and disclosure of environmental impacts under NEPA, that permanent storage of certain nuclear wastes would have no significant environmental impact. The Court's deference to NRC expertise in that case, and its recognition of the appropriateness in certain circumstances of a generic approach to disclosure of environmental impacts under NEPA, support the result here.

Relying on *Limerick*, petitioners assert that the *Baltimore Gas* approach is appropriate only where the issues are indeed generic, and that "where there is a legitimate question of site-specific linkage, the generic approach will not suffice." Pet. 28. In petitioners' view, "the placement of the VSC-24 casks at Palisades has serious site-specific implications." *Ibid.* The generic approach embodied in the NRC's 1990 rule, however, represents the Commission's considered view to the contrary. The premise of that rule is the NRC's finding that casks for dry storage of nuclear waste can be deployed under a general license without significant site-specific environmental implications. As the court of appeals noted, "this type of technical decision by the NRC, operating at the frontiers of science, is entitled to great deference by

the courts." Pet. App. 38a (citing *Baltimore Gas*, 462 U.S. at 103).[9]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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[9] Petitioners seek to bolster their NEPA claim by reference to extra-record documents, including a December 1993 letter from an official of the Environmental Protection Agency and a February 1994 memorandum from an NRC staff member. Pet. 29. The court of appeals denied petitioners' motion to supplement the record with those documents, however, and petitioners do not challenge that ruling here.

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IN THE
Supreme Court of the United States
October Term, 1994

FRANK J. KELLEY, Attorney General of the State of Michigan on behalf of the Citizens of the State of Michigan; HERBERT P. READ; NORMAN W. PERMAN; SUSAN KIMMELMAN; THE LAKE MICHIGAN FEDERATION; and DON'T WASTE MICHIGAN,

Petitioners,

v.

IVAN SELIN; JAMES R. CURTISS; E. GAIL DEPLANQUE; FORREST J. REMICK; KENNETH C. ROGERS; UNITED STATES NUCLEAR REGULATORY COMMISSION; and UNITED STATES OF AMERICA,

Respondents,

CONSUMERS POWER COMPANY,

Intervenor/Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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PETITIONERS' REPLY BRIEF

Certiorari is warranted in this case to allow this Court to review two important questions raised by the Sixth Circuit's decision in *Kelley v. Selin*, 42 F.3d 1501 (6th Cir. 1995): (1) whether a challenge brought in 1993 to a rule adopted by the Nuclear Regulatory Commission ("NRC") in 1990 is time barred -- when the challenge was brought by persons who were first concretely affected by the rule when it was amended in 1993; and (2) whether the NRC is entitled, under the Nuclear Waste Policy Act ("NWPA"), to permit a utility to store, on a *de facto* permanent basis, high level nuclear waste in concrete casks located outside the reactor building on shifting sand dunes adjoining Lake Michigan, without conducting site-specific public hearings under the Atomic Energy Act ("AEA") or site-specific environmental studies under the National Environmental Policy Act ("NEPA"). Because these questions implicate crucial issues concerning the construction and application of three federal statutes affecting the public health and safety, property rights, and the environment, this Court should grant a writ of certiorari.

In their briefs in opposition, Respondents attempt to portray this case as a routine application of settled administrative law principles. That characterization, which strategically attempts to dissuade the Court from reviewing the questions presented, is well off the mark. This case is anything but routine: The Sixth Circuit's conclusions about the timeliness of Petitioners' claims, as well as the NRC's right to promulgate a rule concerning long-term nuclear waste storage in a manner that forecloses meaningful public input and environmental review, trigger issues with enormous impact for the public at large.

The storage capacity at our nation's reactors rapidly is being exhausted, and landowners adjacent to those plants increasingly will be affected by the 1990 NRC rule, as each of our country's nuclear utilities successively invokes the provisions of the rule and begins storing high level

nuclear waste adjacent to its reactors. In the absence of a long-term solution to the storage of nuclear waste, each reactor site in this country will inevitably become a *de facto* permanent repository well into the next century, if not beyond. The issues presented in this case, therefore, involve significant questions warranting review not only because of their present impact but also because of their effect on future generations.

I. THIS COURT SHOULD GRANT CERTIORARI TO DECIDE WHEN SUBPART K FIRST CONCRETELY APPLIED TO PETITIONERS.

A. The Sixth Circuit's Decision Conflicts With This Court's Decisions in *Reno* and *Lujan*.

In *Reno v. Catholic Social Services*, 113 S. Ct. 2485, 2496 (1993), this Court reaffirmed long standing precedent that a challenge to a federal regulation is not ripe for review until the impact of that regulation concretely affects the prospective challengers. In *Reno*, as in *Lujan v. National Wildlife Fed'n*, 497 U.S. 871, 891-92 (1990), the Court held that a generally applicable rule -- like the rule at issue in this case, the Subpart K regulatory framework adopted by the NRC in 1990 -- cannot be challenged until all steps have been taken applying the regulation to the challengers. *Id.* at 2496. The United States concurs with this reading of *Reno*,[1/] but argues that Petitioners' situation is "precisely the converse" of *Reno* because "no further

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[1/] Consumers also asserts that the Sixth Circuit's analysis regarding the timeliness of Petitioners' challenge to the 1990 rule does not conflict with the prior decisions of this Court in *Reno* and *Lujan*, because those decisions involved questions of ripeness, which Consumers asserts are not in issue here. Contrary to this contention, the ripeness decision in *Reno* is directly in tension with the Sixth Circuit's conclusion that the 1990 rule -- a rule of general applicability for all nuclear power reactors -- created a then-ripe controversy which was judicially reviewable.

steps" were required after Subpart K's promulgation to trigger its application to Petitioners. U.S. Br. at 11.

It is inaccurate to assert, as the United States does, that Subpart K applied to Petitioners in 1990. Although Subpart K granted a general license in 1990, the rule did not and could not apply to Petitioners until it was actually invoked by Consumers. Under the general framework put in effect in 1990, Consumers could not utilize the VSC-24 casks at Palisades until: (1) the NRC issued a Certificate of Compliance to the manufacturer of the casks; (2) Consumers officially notified the NRC of its intent to use the casks at Palisades; and (3) Consumers drafted a modified security and emergency preparedness plan relating to the use of the casks. As Respondents acknowledge in their briefs, these steps were not all accomplished until May 1993. U.S. Br. at 4-5; Consumers Br. at 4-5. Only at that time, when no further steps were necessary for Consumers to use the VSC-24 casks, did the rule concretely apply to Petitioners.

The United States alternatively contends that even if the rule did not yet apply to Petitioners in 1990, it nevertheless applied to them in 1991, when the manufacturer of the VSC-24 casks sought to have the casks placed on the approved list. The United States thus argues that even if Petitioners could not bring a challenge in 1990, they could have done so in 1991. U.S. Br. at 13. However, this contention actually undercuts the United States' position, by acknowledging that there were further steps to be taken after 1990 (including the manufacturer's 1991 application) before the rule could be concretely applied to Petitioners. Of course, as Petitioners have shown, even after 1991, there were "further steps" still necessary over the next two years before Consumers could invoke Subpart K.

Respondents also argue that Petitioners (or certain of them) were aware of Consumers' intentions to use the VSC-24 casks as early as 1990. Respondents suggest that because Petitioners knew of Consumers' plans in 1990, they were required to bring their challenge at that time. Respondents rely upon an August 17, 1990 letter from Consumers to the NRC in which Consumers withdrew its application for a site- specific license to store waste using the VSC-24 casks at Palisades, and advised the NRC of its future intent "to utilize the general license granted in new Subpart K *when it is able to satisfy the conditions of the general license."* U.S. Br. at 4; Consumers Br. at 4 (emphasis added.) However, rather than support Respondents' arguments, this letter again undercuts them. The letter acknowledges on its face that as of August 17, 1990, Consumers had *not* invoked the general license and was *not* in a position to do so. Consequently, Consumers could not satisfy the conditions of the general license in 1990. Even if some of the Petitioners were aware of Consumers' plans for the future, there would have been no ripe controversy until Consumers satisfied those conditions. Thus, not until the VSC-24 cask was actually added to the list in 1993, was Consumers even in a position to invoke Subpart K, and only then was Subpart K amenable to a challenge by Petitioners.

Finally, Respondents' assertions that the *Lujan* decision creates an exception to the case or controversy requirement also miss the mark. In *Lujan,* this Court held that some statutes permit broad regulations to serve as judicially reviewable "agency action." *Lujan,* 497 U.S. at 891. However, the *Lujan* Court did not determine that as soon as a rule becomes reviewable, all challenges to that rule are necessarily ripe for review, irrespective of any Article III barriers that may exist. *Cf. Lujan v. Defenders of Wildlife,* 504 U.S. 555 (1992) (Article III jurisdiction is lacking absent a showing that concrete interest is affected).

If, under *Lujan,* all challenges were immediately ripe for review, courts would be saddled with numerous hypothetical disputes. Thus, if Respondents' reading of *Lujan* were correct, every person in the United States who lives or works near a nuclear power plant would have been required in 1990 to bring all possible challenges to the application of Subpart K -- even where, as here, further steps were required before the rule could be concretely applied. That simply is not the law. Certiorari should be granted to resolve each of the issues.

B. The Sixth Circuit's Approach to The Reopener Doctrine Conflicts With Settled Decisions of the D.C. Circuit.

Respondents wrongly assert that the Sixth Circuit's holding is not at odds with D.C. Circuit precedent concerning the NRC's "reopening" of its prior decision. The record demonstrates that the NRC commented extensively about the scope and import of Subpart K when it added the VSC-24 cask to the approved list of casks in 1993. In responding to numerous comments regarding concerns that Subpart K could circumvent public involvement in cask approval decisions, the NRC clarified and expanded upon the original 1990 regulatory scheme. 58 Fed. Reg. 17,949, 17,951, 17,957, 17,959, 17,962-63 (April 7, 1993). Under the D.C. Circuit's reopener decisions, the NRC's extensive comments "reopened" the issue for review. *See, e.g., Public Citizen v. Nuclear Regulatory Com'n,* 901 F.2d 147, 150-51 (D.C. Cir.), *cert. denied sub nom. Nuclear Management and Resources Council, Inc. v. Public Citizen,* 498 U.S. 992 (1990). Like the Sixth Circuit's decision, Respondents essentially ignore these extensive comments.

In addition, Respondents overlook the circuit split between the Sixth and D.C. Circuits. The Sixth Circuit held that the reopener doctrine is inapplicable to this case because

the NRC did not indicate "its intent to reconsider an existing rule." U.S. Br. at 14. This reasoning is directly at odds with the approach taken by the D.C. Circuit, recognizing that an agency may explicitly or implicitly reopen a rule to review through renewed adherence to the rule. *Association of American Railroads v. I.C.C.*, 846 F.2d 1465, 1473 (D.C. Cir. 1988). Because there is a conflict between circuits concerning the governing standard for determining whether an agency has reopened an issue for substantive review, certiorari should be granted.[2/]

II. THIS COURT SHOULD RESOLVE WHETHER THE NUCLEAR WASTE POLICY ACT PERMITS *DE FACTO* PERMANENT STORAGE OF HIGH LEVEL NUCLEAR WASTE WITHOUT SITE-SPECIFIC HEARINGS AND ENVIRONMENTAL REVIEW.

A. Petitioners Are Entitled to an Adjudicatory Hearing under the Atomic Energy Act.

Respondents admit that "[i]t has been the NRC's long-standing administrative practice to grant an adjudicatory hearing opportunity to evaluate *amendments* to a reactor's operating *license.*" Consumers Br. at 22 (emphasis in original). This administrative practice is mandated by the AEA, which requires the NRC to grant adjudicatory hearings when making licensing decisions. 42 U.S.C. § 2239(a)(1)(A). Respondents also admit that the promulgation of Subpart K effectively amended Consumers' operating license, by granting a "general license" to Consumers to store nuclear waste on a long-term basis in

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[2/] Consumers argues that there is no circuit split because the Sixth Circuit did not acknowledge a conflict between its decision and D.C. Circuit precedent, instead finding the reopener cases to have "no bearing" on this case. *Kelley*, 42 F.3d at 1515 n.3. Consumers' argument is purely semantic. The Sixth Circuit's drastically different application of a settled legal doctrine constitutes a conflict.

concrete casks outside the reactor building at Palisades. Consumers Br. at 2, 22. In these circumstances, Petitioners are entitled to an adjudicatory hearing under the AEA because Subpart K, invoked by Consumers in 1993, granted a general license which amended Consumers' operating license at Palisades to allow the storage of nuclear wastes in VSC-24 casks.

Nonetheless, the Sixth Circuit concluded that Petitioners are not entitled to a hearing because the addition of the VSC-24 casks to the approved list of casks in 1993 purportedly did not constitute a licensing decision. *Kelley*, 42 F.3d at 1515. This conclusion underscores the harm Petitioners' have suffered: Petitioners were not entitled to a hearing in 1990, under the rationale of *Reno* and *Lujan*, because they did not have a ripe challenge at that time; and Petitioners were not entitled to a hearing in 1993, under the Sixth Circuit's reasoning, because there was no licensing decision at that time. The confluence of these circumstances has foreclosed Petitioners from any opportunity for an adjudicatory hearing on the use of the VSC-24 casks at Palisades.

As Petitioners have demonstrated, however, this dilemma is properly resolved by the recognition that there was, in fact, a licensing decision in 1993. It was at that time that the NRC determined that Consumers had satisfied all of the conditions of the general license available under Subpart K. Consequently, when Consumers' operating license was effectively amended in 1993 to allow the storage of high level nuclear wastes in VSC-24 casks at Palisades, Petitioners were entitled to an adjudicatory hearing, under long-standing administrative practice mandated by the AEA, to evaluate the impact of that amendment. Certiorari should therefore be granted to resolve this dilemma created by the Sixth Circuit's decision.

Respondents also contend that the AEA hearing requirement is overridden by the NWPA, which, they argue, grants the NRC discretion to approve nuclear waste storage facilities at reactors on a generic basis, without the need for site-specific hearings.[3/] However, Respondents misread the NWPA, which expressly limits the NRC's "generic approval" power. As the United States acknowledges: "The NWPA . . . called upon the NRC to establish procedures for the generic approval of standardized spent fuel technologies 'without, *to the maximum extent practicable,* site-specific approvals.'" U.S. Br. at 14 (citing 42 U.S.C. § 10198(a); emphasis added). By granting the NRC approval power only "to the maximum extent practicable," Congress allowed the NRC to make certain generic decisions, but limited the NRC's authority to matters for which it is practicable for the NRC to consider issues on a generic basis. In particular, as reflected in the NWPA's legislative history, Congress understood that it would not be practicable for the entire storage approval process to proceed without examining site-specific safety characteristics. *See* H. Rep. No. 491, Part 1, 97th Cong., 2d Sess. 41 (1982). Because the NWPA expressly provides that certain decisions are beyond the purview of generic rulemaking, the NWPA does not trump the AEA's requirement that adjudicatory hearings be held in connection with licensing amendments.

B. The NRC Should Have Considered the Environmental Impact of Placing VSC-24 Casks at Palisades.

Under NEPA, all federal agencies, including the NRC, must consider the environmental impacts of proposed

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[3/] The United States' alternative contention that the NRC has satisfied the AEA's "hearing" requirement is unavailing. *See* U.S. Br. at 15. The NRC's three-hour informational meeting, which did not provide Petitioners a forum to make substantive comments, clearly was not adjudicatory in nature.

agency actions, and, where significant, prepare environmental impact statements ("EIS") before carrying out those actions. *Robertson v. Methow Valley Citizens Council,* 490 U.S. 332, 349 (1989). In determining whether an EIS is necessary, the agency must first prepare an environment assessment ("EA"). 40 C.F.R. § 1508.9(a)(1). However, the NRC prepared neither an EA nor an EIS concerning the long-term storage of high level nuclear waste in VSC-24 casks outside the Palisades plant, 150 yards from Lake Michigan.

In holding that the NRC was not required to conduct a site-specific EA for the use of VSC-24 casks at Palisades, the Sixth Circuit ruled that the preapproval of concrete casks was a generic rulemaking that merely required a generic EA. *Kelley,* 42 F.3d at 1520. This conclusion conflicts with *Limerick Ecology Action v. U.S. Nuclear Regulatory Com'n,* 869 F.2d 719, 738 (3d Cir. 1989), in which the Third Circuit recognized that a generic EA "will not suffice where the underlying issues are not generic. . . [or are] insufficiently generic." In fact, there are numerous site-specific safety issues implicated by the use of VSC-24 casks at Palisades that mandate NEPA compliance: the feasibility of placing high-level nuclear wastes in concrete casks 150 yards from Lake Michigan; modifying security and emergency plans; and analyzing whether sand dunes can safely hold the weight of the 130 ton casks. These same concerns have been recognized by Valdas Adamkus, the EPA Administrator for Region V,[4/] as well as Dr. Ross Landsman, an NRC soils expert. In light of these site-specific issues, which concern the storage of nuclear waste in VSC-24 casks outside of the Palisades plant

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[4/] In its brief, Consumers misleadingly refers to Mr. Adamkus as "an EPA employee." Consumers Br. at 27 n. 16. Actually, as Administrator of EPA Region V, Mr. Adamkus is the most important EPA official in the Midwest Region of the EPA.

on the shores of Lake Michigan, and which the NRC has itself recognized, the NRC should have performed site-specific environmental analyses required by NEPA. In failing to so hold, the Sixth Circuit strayed from settled precedent.

CONCLUSION

For the reasons stated in the Petition for Writ of Certiorari and herein, Petitioners respectfully request this Court to grant a writ of certiorari on the questions presented.

Respectfully submitted,

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